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No.

In the
Supreme Court of the United States

CAREN CRONK THOMAS and WINDY CITY HEMP DEVELOPMENT BOARD,

Petitioners,

vs.

CHICAGO PARK DISTRICT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does immediate access to the courts following a denial of a permit for core political speech in a traditional public forum constitute prompt judicial review, as required by *Freedman v. Maryland*, without regard to the length of time allowed for a judicial decision?

II. Must an ordinance requiring a permit for core political speech in a traditional public forum include each of the procedural safeguards established in *Freedman v. Maryland*, or is that case only applicable to sexually explicit speech presented by adult entertainment businesses?

III. Is a content-neutral ordinance that requires a permit for core political speech in a traditional public forum analyzed as a prior restraint or under the more deferential standard applicable to time, place and manner regulations?

IV. May a plaintiff bring a facial challenge to a permit ordinance which restricts political speech in a public forum without first having to prove that the ordinance has been unconstitutionally applied to him because of the government's hostility to the plaintiff or his proposed speech?

V. Can an ordinance requiring a permit for core political speech in a traditional public forum include unfettered discretion to issue or withhold permits?

PARTIES TO THE PROCEEDING

The Petitioners, who were Appellants in the Seventh Circuit, are Caren Cronk Thomas and Windy City Hemp Development Board, an Illinois not-for-profit corporation. The original Plaintiff in the District Court was Robert MacDonald, who died while this case was on appeal to the Seventh Circuit. Thomas and the Board were allowed to substitute as parties after MacDonald's death.

The Respondent is the Chicago Park District, the Defendant in the District Court and the Appellee in the Circuit Court.

Except as stated above, all parties to the proceedings below are parties to this Petition.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Counsel for the Petitioners informs this Court that Windy City Hemp Development Board has no parent or subsidiary corporations, and no publicly owned company holds any ownership interest in the corporation.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, reported at 227 F.3d 921, is reproduced at Appendix A to this Petition. The Order of the Court of Appeals denying the Petition for Rehearing en banc is reproduced at Appendix B. The unreported opinion of the United States District Court for the Northern District of Illinois is reproduced at Appendix D.

JURISDICTION

The Court of Appeals entered its judgment on September 14, 2000. Petitioners timely filed a Petition for Rehearing en banc on September 28th. The Petition was denied on November 7, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional provisions

The First Amendment to the Constitution of the United States of America provides that "Congress shall make no law . . . abridging the freedom of speech . . .

Statutory provisions

The Chicago Park District regulates the use of all parks in the City through a permit ordinance. The provisions of that Ordinance that are pertinent to this Petition are reproduced as Appendix F.

STATEMENT OF THE CASE

The Chicago Park District Ordinance requires that anyone planning to hold a political rally in any City park, involving more than 50 people or utilizing "amplified sound," must first obtain a permit from the Park District's General Superintendent.[1] App. F at 92a-93a. The ordinance lists several bases allowing the denial of a permit.[2] For example, an application can be denied if some Park District employee decides for some reason that the application is "incomplete."[3] An applicant can be denied if unspecified Park District officials, in a non-public procedure that involves undisclosed information from unknown sources, decide that an applicant, or some other unknown or unnamed person or persons, violated some term or condition of a prior permit.[4] A permit can be denied if, at a prior event held by the applicant under a permit, there was damage done to park property and the applicant has not paid for

1. *Amplified sound* is defined in Chapter VII, § A of the Ordinance as "any sound projected or transmitted by artificial means, including, but not limited to, loudspeakers, amplifiers, powered megaphones or any similar devices." App. F, at 91a.

2. Denial is discretionary. §§ 5(E) and 5(E)(5) state that the General Superintendent "may" deny a permit. Neither says "shall." There are no standards to limit the exercise of this discretion. App. F at 96a.

3. § 5(e), App. F at 97a. Joan Fencik, General Counsel for the Park District, testified before Magistrate Judge Keys that the Ordinance does not require the Park District to inform an applicant why the application was found to be "incomplete." Presumably, this means that only the person rejecting the application would know.

4. § 5(e), App. F at 97a. There is no restriction as to which permit provisions must have been violated. That is left to the unfettered discretion of the Park District.

the damage; this basis can be utilized even if the damage at the prior event was done by counter-demonstrators or others having no relationship with the applicant.[5] A permit can be denied if persons unconnected with the applicant remained in the park after a prior event.[6] There are no provisions for a hearing before or after a permit is denied.[7] The applicant is not entitled to know who made the allegations, nor see any evidence of the alleged violations. He is not even allowed to attend whatever meeting or conference is held (if any) at which the decision to deny a permit is made.

If the Park District finds a basis for denial, that finding can result in a lifetime prohibition against the applicant engaging in political speech in any City park, in the discretion of the General Superintendent.[8]

On March 5, 1997 Robert MacDonald applied for a permit to hold a political rally on the subject of drug law

5. § 5(e)(5), App. F at 97a. In a hearing before Magistrate Keys on May 6, 1997, Fencik testified that the Park District can deny a permit *regardless* of who damaged the park at a prior event.

6. Fencik testified to this construction of the Ordinance at the May 6th hearing.

7. "[T]here is no requirement of proof or adjudication to determine whether such misconduct has occurred; it appears that the mere belief of the Park District official that such misconduct occurred is enough to deny an application." App. C at 17a.

8. Fencik testified that the Park District construes the Ordinance as authorizing a lifetime ban.

reform.[9] The event was to be held in Grant Park. On March 12th MacDonald was notified that his permit application had been denied. The principal reason given for the denial was a determination by the Park District that he had violated the terms of two permits for a political rally in September of the previous year. MacDonald immediately filed an appeal, arguing that he had never committed any violations of the previous permit.[10] The appeal was denied. MacDonald filed an amended appeal. It also was denied.[11] In response, MacDonald filed suit in the District Court under 42 U.S.C. § 1983, arguing that the permit ordinance was an unlawful prior restraint on free speech.

Magistrate Judge Arlander Keys entered a preliminary injunction. The Park District appealed, and the Seventh Circuit vacated the injunction. *MacDonald v. Chicago Park District*, 132 F.3d 355 (7th Cir. 1997).

The parties engaged in limited discovery,[12] and on March 8, 1999 Magistrate Judge Keys filed his Report and Recommendation. App. D. He recommended a judgment

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9. It is difficult to imagine a more controversial subject, particularly in a City where the administration has taken a hard line position against the legalization of marijuana.

10. The "appeal" is a letter to the General Superintendent.

11. He did not get a permit for this rally, and even though he applied for several more before he died, he never received another one.

12. The discovery was to determine if the Park District had a well-established practice of constitutional construction and application of its ordinance. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992). The Park District refused to cooperate in the discovery, (as found by both Magistrate Judge Keys and District Judge Marovich) and provided no historical record of its past practice.

declaring much of the ordinance unconstitutional, and a permanent injunction. But on March 29th, United States District Judge George M. Marovich rejected the Report, upheld the ordinance in its entirety, and granted summary judgment for the Park District. App. E. MacDonald appealed to the Seventh Circuit.

On September 14, 2000 a panel of the Court of Appeals affirmed, finding the ordinance constitutional in all respects. App. A. The panel declined to utilize a prior restraint analysis, finding such an analysis "not helpful" in deciding what it called "novel cases."[13] App. A at 3a. The panel also said facial challenges to such ordinances would not "provide much assistance to judges." *Id.* The panel ignored this Court's many pronouncements on the value of core political speech, finding instead that it is entitled to less protection under the First Amendment than the sexually oriented speech typically presented in topless bars and adult bookstores. The panel held that the Park District did not bear the burden of initiating judicial review when it denied a permit,[14] and that the procedural safeguards mandated by this Court in *Freedman v. Maryland*, 380 U.S. 51 (1965), and reaffirmed in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), only apply to ordinances expressly authorizing censorship.

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13. The panel never said why it found this case to be "novel."

14. Interestingly, the Seventh Circuit had previously held that whenever the Park District denies a free speech permit, it is required under *Freedman* to initiate judicial procedures. *Collin v. Chicago Park District*, 460 F.2d 756-57 (7th Cir. 1972). The Park District has apparently ignored that ruling for nearly 30 years.

Petitioners Caren Cronk Thomas and the Windy City Hemp Development Board filed a petition for rehearing en banc on September 28, 2000. On November 7th the Court denied the petition. App. B.

REASONS FOR GRANTING THE WRIT

This case is about the most precious aspect of the First Amendment: the right of citizens to speak out publicly on issues of political importance. The Petition involves each of the factors listed in this Court's Rule 10 that guide this Court's decisions on granting certiorari review. The decision below is in direct and irreconcilable conflict with decisions of other federal circuits,[15] and relevant decisions of this Court. Of equal importance, the Seventh Circuit has decided a significant question of federal law, arising under the Free Speech Clause of the First Amendment, that has not been settled by this Court, but that cries out for resolution.

It is of the utmost constitutional importance that this Court grant the Petition. The Petitioners' speech is the most important class of speech in our democratic republic.[16] This case is not about sexually explicit speech, that "falls only within the outer ambit of the First Amendment's protection." *Pap's*

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15. This Court recognized the conflict; *City News & Novelty, Inc. v. City of Waukesha*, No. 99-1680 (January 17, 2001).

16. In their concurring opinion in *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992), Justices Stevens, White and Blackmun wrote: "Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech. Core political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; obscenity and fighting words receive the least protection of all."

A.M. v. City of Erie, 529 U.S. 277, ___, 120 S.Ct. 1382, 1391 (2000). At stake is the very life of the First Amendment's protection for core political speech in a traditional public forum. The First Amendment is concrete evidence of our "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). But in the Seventh Circuit today, as a result of the opinion in this case, the right to free political speech in public parks is in extreme danger.[17] Yet, protecting political speech is why the First Amendment was added to our Constitution:

> The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values," and is entitled to special protection. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982); *Carey v. Brown*, 447 U.S. 455, 467 (1980).

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17. Public parks, of course, are that public forum "held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939).

Connick v. Myers, 461 U.S. 138, 145 (1983).

Core political speech survives, in the face of government suppression, *only* because of First Amendment principles forged by this Court. Now, with an unusual hostility to those principles, the Seventh Circuit has decided that political speech is deserving of less protection than the sexually explicit speech described by this Court as at the "outer perimeters of the First Amendment." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991).

I. The Seventh Circuit opinion is in direct conflict with decisions of other circuit courts on the requirements of *Freedman v. Maryland*.

Of prime importance to this Court, in meeting its constitutional obligation to the lower courts, is the need to resolve a serious conflict among the circuits on an issue of significant importance: the requirement that a prior restraint of speech provide for prompt judicial review. The circuits are divided as to what "prompt judicial review" means. In its opinion dismissing the petition in *City News & Novelty, Inc. v. City of Waukesha*, 2001 WL 37653 at *2 (2001), the Court said: "We granted certiorari to resolve the conflict." That case is now gone; this case presents the Court with a perfect opportunity to finally resolve that conflict.

A. This Court must determine what constitutes prompt judicial review.

In 1965, this court decided *Freedman v. Maryland*, 380 U.S. 51 (1965). The case involved a statute that required movie exhibitors to submit every film to a review board to obtain a

license for showing the film in the state. The Court held that whenever the government imposes a prior restraint on free speech through a permit scheme, that scheme must contain three procedural safeguards. One of those safeguards requires prompt judicial review if a license is denied. 380 U.S. at 59. *See also, FW/PBS*, 493 U.S. at 228 ("there must be the possibility of prompt judicial review in the event that the license is erroneously denied.")

In *Freedman* the Court made it clear that the term "prompt judicial review" meant more than mere prompt access to the judicial system:

> Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of a temporary restraint, an administrative refusal to license, signifying the censor's view that the film is unprotected, may have a discouraging effect on the exhibitor. *See Bantam Books, Inc. v. Sullivan, supra*. Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.

380 U.S. at 59.

Prompt judicial review, so clearly defined in *Freedman*, is no longer required in the Seventh Circuit when the

government imposes a prior restraint on core political speech.[18] As several of the circuits, including the panel in this case, and this Court in *City News & Novelty, Inc. v. City of Waukesha*, 2001 WL 37653 (January 17, 2001), have pointed out, there is a serious split among the circuits as to just what that phrase means after *FW/PBS*. That split must be resolved by this Court.

The conflict began when the Seventh Circuit decided *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993) (*en banc*), *cert. denied*, 511 U.S. 1085 (1994). In *Graff*, five judges said that a permitting ordinance that allows prompt access to the courts is all the First Amendment and *Freedman* require. However, five judges disagreed, and two judges expressed no opinion. Therefore, there was no holding on this point.[19]

The *Graff* plurality opinion quickly came under fire. When a county in Maryland argued to the Fourth Circuit that under *Graff* prompt judicial access was sufficient, the Court strongly rejected that claim and held that a prompt judicial determination was required. *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988, 994 (4th Cir. 1995)(en banc), *cert. denied*, 516 U.S. 1010 (1995). In *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224-25 (6th Cir.

18. It would appear that under the panel decision, prompt judicial review is required when the government imposes a restriction on topless dancing.

19. This did not prevent a panel in a later Seventh Circuit case to say: "The opportunity to apply for that writ [of common-law certiorari] is enough, *we have held*, even when rights under the first amendment are at stake. *Graff v. Chicago*, 9 F.3d 1309, 1323-25 (7th Cir. 1993)(en banc)." *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 167 (7th Cir. 1994)(emphasis added). That panel consisted of Judge Manion, the author of the plurality in *Graff*, Judge Easterbrook, also in the *Graff* plurality and a judge in this case, and a district court judge.

1995), the Sixth Circuit also rejected the argument that mere access to judicial review satisfies the *Freedman* prompt judicial review requirement. While observing that "the Supreme Court has not expressly defined prompt judicial review," the Court said that even if access were immediate, "a permit applicant would still have to wait three to five months for judicial review." *Id.* at 225. The court held that this delay did not constitute prompt judicial review.

The Ninth Circuit added its voice in *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097, 1101 (9th Cir. 1998):

> We reject the view of the Fifth and Seventh Circuits that mere access to judicial review is sufficient. As the Seventh Circuit acknowledged in *Graff*, "[a] person always has a judicial forum when his speech is allegedly infringed." *Graff*, 9 F.3d at 1324. Thus, to hold that mere access to judicial review fulfills the second *Freedman* safeguard makes the safeguard itself meaningless. We conclude that "prompt judicial review" means the opportunity for a prompt hearing and a prompt decision by a judicial officer.

Joining the Seventh Circuit in holding that prompt access is all the First Amendment requires are the First and Fifth Circuits. The First Circuit, in *Jews for Jesus, Inc. v. Massachusetts Bay Transportation Auth.*, 984 F.2d 1319 (1st Cir. 1993), upheld a provision in an ordinance requiring prior authorization for solicitation in certain public areas. Interestingly, and without much discussion, the court said the ordinance complied with *Freedman*'s prompt judicial review requirement because it allowed a prompt *administrative* appeal

following denial of an authorization request. *Id.* at 1327. There were no time limits for a decision by the administrative hearing officer. Nevertheless, that did not convince the First Circuit that the prior restraint imposed on protected speech was unconstitutional.

In *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir. 1994) the court held that prompt judicial access is all that is required under *Freedman* and *FW/PBS*, with this interesting statement:

> Despite contrary suggestions in Justice Brennan's opinion in *FW/PBS, Inc.* and some uncertainty in the language of Justice O'Connor's opinion in the same case, we read the Supreme Court to insist that the state must offer a fair opportunity to complete the administrative process and access the courts within a brief period. A "brief period" within which all judicial avenues are exhausted would be an oxymoron.

Of interest are several decisions of the Second and Eleventh Circuits on this same point. In *Beal v. Stern*, 184 F.3d 117, 129 (2nd Cir. 1999), a panel held that if an ordinance requiring a permit to engage in political speech in a public park allowed prompt judicial access to the courts, a common-law certiorari proceeding would satisfy *Freedman*. But a second panel opinion, authored by one of the judges from the first panel, said that New York's common-law certiorari procedure may not meet the prompt judicial review requirement if it does not mandate a prompt judicial decision. *MacDonald v. Safir*, 206 F.3d 184, 195 (2nd Cir. 2000). It appears, then, that in the

Second Circuit prompt access to a court *and* a guarantee of a prompt judicial decision is required.

Equally interesting are three decisions in the Eleventh Circuit. In *Redner v. Dean*, 29 F.3d 1495, 1500-01 (11th Cir. 1994), *cert. denied*, 514 U.S. 1066 (1995), the court struck an adult entertainment business licensing ordinance because it did not contain the required *Freedman* safeguards. Some circuit courts read the *Redner* opinion as rejecting the "prompt judicial access" position. *East Brooks Books*, 48 F.3d at 225; *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108, 1115 (9th Cir. 1999).

But the issue remains unclear in the Eleventh Circuit. In *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1255 (11th Cir. 1999), *cert. denied*, 120 S.Ct. 1423 (2000), the court discussed the conflict:

> The First, Fifth and Seventh Circuits hold that for licensing ordinances, prompt judicial review only means access to prompt judicial review. *See TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir. 1994), followed in *Grand Brittain, Inc. v. City of Amarilio*, 27 F.3d 1068, 1070-71 (5th Cir. 1994) (per curiam); *Graff v. City of Chicago*, 9 F.3d 1309, 1324-25 (7th Cir. 1993) (en banc); *Jews for Jesus, Inc. v. Mass. Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir. 1993). On the other side are the Fourth and Ninth Circuits and arguably the Sixth, which hold that *Freedman* and *FW/PBS* require a guarantee of prompt judicial resolution. *See Baby*

> *Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101-02 (9th Cir.1998), followed in *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108 (9th Cir. 1999); *11126 Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 988, 998- 1001 (4th Cir. 1995) (en banc); *cf. East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224-25 (6th Cir. 1995) (state certiorari procedures an insufficient guarantee of prompt judicial review).

The court said that for adult entertainment business licensing ordinances, prompt access is sufficient:

> [W]e agree with the First, Fifth and Seventh Circuits and hold that access to prompt judicial review is sufficient *for adult entertainment licensing ordinances.*

187 F.3d at 1256-57 (emphasis added).

The court later clarified its holding in *Cannabis Action Network, Inc. v. City of Gainesville*, 231 F.3d 761 (11th Cir. 2000), a core political speech case:[20]

> [O]ur distinction, in this instance, rests not on the semantics of a given statute, but on the inherent differences between the facts of this case and cases involving business licensing statutes such as those in *FW/PBS* and *Boss Capital*.

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20. Circuit Judge Dubina authored the opinions in *Boss Capital* and *Cannabis Action Network*.

231 F. 3d at 775.[21]

In *Cannabis Action Network* the City argued that even in a core political speech case, prompt judicial access was sufficient. But the Court declined to decide the question:

> [W]e limited ourselves in *Boss Capital* to the specific facts before us and decline to answer the unposed question of whether *Freedman's* requirement of "prompt judicial review" demanded explicit provision for prompt judicial determination in challenges not involving business licensing schemes. *See id.* at 1256-57. For the reasons explained below, we need not answer that difficult question today.

231 F.3d at 774.

The division among the circuits was expressly recognized by the panel in this case. App. A at 11a (citations omitted). No one can disagree with Petitioners' claim that this issue has so divided the circuits that there is no consistent principle of law applicable to the fifty states.[22] Citizens in some

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21. This is a distinction the Seventh Circuit panel refused to make.

22. Page limitations prevent a discussion of how the conflict has affected the district courts, particularly those in circuits where the circuit court has not ruled on the issue. One can compare *Books, Inc. v. Pottawattamie County*, 978 F. Supp. 1247 (S.D. Iowa 1997), a court in the Eighth Circuit, holding that prompt judicial access is sufficient, with *Franken Equities, L.L.C. v. City of Evanston*, 967 F. Supp. 1233 (D. Wyoming 1997), a court in the Tenth Circuit, holding that only a guarantee of a prompt judicial

(continued...)

states have greater constitutional protection for their right to free speech (of all types) than citizens of other states. The circuit courts are divided; the district courts are divided; and the situation cries out for resolution by this Court.[23] As Judge Ripple wrote in his concurring opinion in *Graff*, discussing prompt judicial review:

> The eyes of the bench and bar, and certainly those of the Justices of the Supreme Court of the United States who will undoubtedly be asked to review our work, are a fragile national resource. Under the unique circumstances presented here, however, an addition to the dialogue is justified because this case presents a most difficult problem for the court, a problem that, in the final analysis, can only be resolved by additional guidance from the Supreme Court of the United States . . . .

Graff v. City of Chicago, 9 F.3d at 1333 (Ripple, J., concurring).

(...continued)
decision will satisfy *Freedman*. Both of those cases involved adult business licensing ordinances.

23. The panel opinion in this case says that the Eleventh Circuit has *held* that "for licensing ordinances, prompt judicial review only means access to prompt judicial review." But as we see in *Cannabis Action Network*, the Eleventh Circuit takes that position only for sexually oriented business licensing ordinances. This merely highlights Petitioners' claim that the conflict among the circuits grows worse by the decision, and must be settled by this Court.

B. The Court must also determine who bears the burden to seek judicial review.

There is also a conflict between the Seventh and Eleventh Circuits on who must initiate judicial review. The panel in this case said it is the unsuccessful permit applicant who must seek judicial review:

> If a person denied a permit for reasons that he believes violate the First Amendment is dissatisfied with a paper record reviewed in state court by means of common law certiorari, he has only to bring a suit in federal district court and if the matter is urgent to seek as these plaintiffs' predecessor (the deceased MacDonald) did a preliminary injunction.

App. A at 10a.

But in the recent decision in *Cannabis Action Network, Inc. v. City of Gainesville*, 231 F.3d 761, 776 (11th Cir. 2000) the Eleventh Circuit disagreed:

> In the case before us, the censored party lacks the business incentive to pursue review through the courts, and the speech at issue is core political speech in a public forum . . . The right to speak sought by CAN in this instance deserves greater protection than that outlined by the plurality in *FW/PBS*. Accordingly, we decline to relieve the City of the requirement that its Street Closing Ordinance meet *Freedman*'s first procedural safeguard.

This, then, becomes another conflict to resolve, adding to the importance of granting this Petition for Certiorari.

II. The panel has decided important federal questions in a way that directly conflicts with relevant decisions of this Court.

The Seventh Circuit panel issued several somewhat remarkable pronouncements in this case. In at least two respects, the panel declined to follow precedent from this Court. The panel determined that a permit scheme restricting core political speech in a traditional public forum is not analyzed as a prior restraint but as a time, place and manner restriction. App. A at 11a. And the panel directed district courts not to consider a facial challenge to such a permit ordinance unless the applicant can prove he was denied a permit because of government hostility to him or his speech. *Id.*

A. A permit scheme restricting core political speech in a public forum must be analyzed as a prior restraint.

In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) this Court reviewed a licensing ordinance applicable to "sexually oriented businesses." The Court of Appeals for the Fifth Circuit had found the ordinance valid after applying a time, place and manner analysis. *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988). In so doing the Fifth Circuit rejected the appellants' claim that the ordinance must include the procedural safeguards from *Freedman v. Maryland*.

This Court granted review. Justice O'Connor, in a plurality opinion, wrote:

> We granted certiorari on the issue whether the licensing scheme is an unconstitutional prior restraint that fails to provide adequate procedural safeguards as required by *Freedman v. Maryland*, 380 U.S. 51 (1965) . . . Because we conclude that the city's licensing scheme lacks adequate procedural safeguards, we do not reach the issue whether the ordinance is properly viewed as a content-neutral time, place, and manner restriction aimed at secondary effects arising out of the sexually oriented businesses. Cf. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 562 (1975).

493 U.S. at 222-23.

Justices Stevens and Kennedy joined the plurality. Justices Brennan, Marshall and Blackmun, in a concurring opinion, left no doubt that the ordinance was to be analyzed as a prior restraint. Therefore, six justices of this Court concluded that Dallas' *content-neutral* licensing regulation, requiring a business to obtain city permission before engaging in free speech, was a prior restraint.

Professing "confusion" about the decision in *FW/PBS*,[24] and finding a prior restraint analysis "not helpful" (App. A at 3a), the Seventh Circuit has now decided that a "content-neutral" ordinance restricting political speech is not a prior

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24. *Graff*, 9 F.3d at 1334-35 (7th Cir. 1993)(plurality opinion).

restraint. The panel did exactly what the Fifth Circuit had done in *FW/PBS*: it considered the ordinance as a time, place and manner regulation.

The difference between a prior restraint and a time, place and manner restriction is of great constitutional significance. A prior restraint comes to the reviewing court "bearing a heavy presumption against its constitutional validity." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558. The government bears a heavy burden to demonstrate that a prior restraint meets the requirements of the First Amendment. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *New York Times Co. v. United States*, 403 U.S. 713 (1971). A time, place and manner ordinance, like most laws, is presumed valid, and one who challenges it bears the burden of demonstrating its invalidity. A prior restraint restricting political speech must include each procedural safeguard in *Freedman*. A time, place and manner restriction need not.

It is clear that if the courts are allowed to disregard this Court's requirement that a prior restraint analysis be applied to permit ordinances restricting political speech, the burden on the unsuccessful permit applicant has been greatly increased, and his ability to demonstrate the invalidity of the ordinance has been greatly diminished.

B. A plaintiff must be allowed to facially challenge a permit scheme restricting core political speech in a public forum.

Core political speech survives, in the face of constant governmental attempts to suppress it, *only* because of this Court's vigilance and the First Amendment principles forged by this Court over decades. Now, with an unusual and

inexplicable hostility to those principles, the Seventh Circuit has placed numerous and potentially insurmountable hurdles before a political speaker denied the right to speak in a public forum. Not the least of these is the panel's strong suggestion that facial challenges are merely semantic nit-picking, and that speakers should not be granted relief unless they demonstrate that permit denials have been motivated by government hostility to the applicant or his message. In so holding, the Seventh Circuit refused to follow this Court's mandate in *City of Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750 (1988).

As this Court recognized, there are several reasons behind allowing a facial challenge to governmental impediments to the exercise of political speech. They include the fact that the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech. *City of Lakewood*, 486 US at 757. It has been clear ever since *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940), that "[p]roof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas." Yet, the Seventh Circuit panel has now turned the clock back more than six decades, by requiring proof of the censor's abuse of power before one can attack the legitimacy of that power.

Perhaps more importantly, where a governmental agency has been given carte blanche authority to issue or refrain from issuing permits, the lack of standards for such action makes it difficult to distinguish between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power:

> Standards provide the guideposts that check the licensor and allow courts to

> determine whether the licensor is discriminating against disfavored speech. Without these guideposts, post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression."

Lakewood, 486 U.S. at 758.

The panel decision now forces those wishing to speak out on political issues to prove that which this Court has recognized is not subject to proof, *i.e.*, that the permit was denied because of hostility to the content of the speech. This is another instance of the panel's rejection of long standing First Amendment requirements which this Court has settled long ago.

C. The panel decision approving a prior restraint with unfettered discretion is in direct conflict with numerous decisions of this Court, including *FW/PBS, Inc. v. City of Dallas*.

In two Reports and Recommendations, Magistrate Judge Keys meticulously detailed numerous sections of the Ordinance that clearly contain unlawful discretion. App. C; App. D. He recommended that §§ C.4(c), (d) and (f), and §§ C.5(e) and C.6(c) be found unconstitutional for that reason alone. App. D at 60a-72a. He found that the Ordinance "gives the Park District substantial power (whether or not exercised) to censor based on the content or viewpoint of speech: discretion to deny permit applications; discretion as to the fees and expenses

imposed on permittees; and discretion as to the time taken to process an application." App. D. at 33a.

District Judge Marovich, relying only on the opinion in *Graff*, rejected Judge Keys' recommendation and, instead, found no unlawful discretion in the ordinance. App. E at 89a. The Seventh Circuit panel ignored the issue. App. A at 5a-7a.

One need look no further than this Court's opinion in *FW/PBS* to understand that the district court and the Seventh Circuit panel ignored this Court's binding precedent on this issue:

> [A] scheme that places "unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *Lakewood v. Plain Dealer Publishing* Co., 486 U.S. 750, 757 (1988). *See Saia v. New York*, 334 U.S. 558 (1948); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Kunz v. New York*, 340 U.S. 290 (1951); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Freedman v. Maryland*, 380 U.S. 51 (1965); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Shuttlesworth v. Birmingham, supra*; *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984). " 'It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.' "

> *Shuttlesworth, supra*, 394 U.S., at 151 (*quoting Staub, supra*, 355 U.S., at 322).

493 U.S. at 225-26.

None of the "criteria" found in the Park District Ordinance contain any semblance of the specificity required by decades of this Court's jurisprudence. The litany of reasons set forth in the ordinance for denial of a permit allows any request for a permit to be denied. But the defect is more severe. It is made constitutionally intolerable by the provision which states that even though one or more of the reasons for denying a permit exist, the Park District *may*, without giving any reasons, grant the permit anyway. There is no constraint upon the Park District's freedom to deny any permit application *based on the message of the speaker!* Whether the parks may be used for political speech is dependent solely upon the whim of politically appointed officials. Only by ignoring this Court's clear precedent of over half a century can such a procedure be countenanced.

The panel opinion is in stark contrast to this Court's requirements for clear, objective standards whenever a prior restraint is imposed on the right to free speech. This Ordinance is simply a longer version of the parade ordinance condemned in *Shuttlesworth*. This Court must grant review to correct the Seventh Circuit's misreading of numerous decisions of this Court on this point.

CONCLUSION

> The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity

> essential to the security of the Republic, is a fundamental principle of our constitutional system.
> *Stromberg v. California*, 283 U.S. 359, 369 (1931).

In the Seventh Circuit, core political speech – expression on public issues – no longer occupies the highest rung of First Amendment values. Incredibly, the Seventh Circuit has now decreed that core political speech – described by this Court as "the essence of self-government" – is to receive less protection from potential government censorship than sexually explicit speech in adult entertainment businesses.[25] Permit schemes for political speech in public parks are no longer prior restraints, and need not include *Freedman*'s procedural safeguards. Public parks are not to be "used for purposes of assembly, communicating thoughts between citizens, and discussing public questions,"[26] but are primarily for recreation. An unsuccessful applicant for a permit to engage in free speech must bear the burden of initiating judicial review, and bear the burden in court.[27] Unsuccessful permit applicants must prove that a permit was denied because of government

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25. The panel described core political speech as "political and ideological agitation." App. A at 4a.

26. *Hague v. CIO*, 307 U.S. 496, 515 (1939).

27. There is little difference between a citizen denied a permit for political speech and a movie exhibitor denied a permit to show a film. "[I]t may prove too burdensome to seek review . . . " of the denial. *Freedman*, 380 U.S. at 59. The speaker may well be deterred from engaging in "a protracted and onerous course of litigation." *Id.* Denial of the permit "may have a discouraging effect" on the political speaker. *Id.* But there is one critical distinction: the value of the speech. The panel decided that sexually explicit speech deserves more protection. This Court has consistently said that core political speech is afforded the highest degree of protection.

hostility to them or their proposed speech. First Amendment values have been turned upside down.

Petitioners cannot state their case in strong enough terms. Core political speech is in serious danger. Permitting authorities are now, for all practical purposes, the final arbiters of who will speak in a public park and who will not, since prompt judicial review of the denial of a permit is no longer guaranteed. Unless this Court acts, speakers with views disfavored by the government will be silenced, and only those with a viewpoint winning government approval will have use of our parks to advance their political beliefs.

This Petition for Certiorari must be granted to review the decision of the Court of Appeals in this case.

Respectfully submitted,

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APPENDICES

In the

United States Court of Appeals

for the Seventh Circuit

No. 99-1811

CAREN CRONK THOMAS and WINDY CITY HEMP DEVELOPMENT BOARD,

Plaintiffs-Appellants,

v.

CHICAGO PARK DISTRICT,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 2963—George M. Marovich, *Judge.*

Argued April 19, 2000—Decided September 14, 2000

Before POSNER, COFFEY and EASTERBROOK, *Circuit Judges.*

POSNER, *Circuit Judge.* Among the regulations of

the Chicago Park District governing the use of its parks is one requiring that a permit be obtained for an assembly, parade, demonstration, sporting event, or other use of the park by a group of 50 or more persons. Chi. Park Dist. Code ch. VII § C. The regulation spells out the criteria for the grant of such a permit, and the procedures for obtaining it and for challenging its denial, in considerable detail. The plaintiffs, who want to use the park for rallies in favor of repealing the laws criminalizing the sale of marijuana, claim that the regulation violates the free-speech clause of the First Amendment "on its face," that is, without regard to whether the regulation has been applied in such a way as to infringe the right of free speech. *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 129-30 (1992); *Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 755-59 (1988); *North Avenue Novelties, Inc. v. City of Chicago,* 88 F.3d 441, 444 (7th Cir. 1996). "Challenges to statutes as written, without inquiring into their application, are appropriate when details of implementation are inconsequential (usually because nothing could be done in the course of application to save the law) or when the laws are so overbroad that the risk of improper application leads persons to withdraw from the borderland. Fear of penalty, leading to a reduction in speech, supports the doctrine that a person whose speech lawfully could be regulated may challenge a statute achieving regulation in an improper way, or to an excessive extent." *Harp Advertising Illinois, Inc. v. Village of Chicago Ridge,* 9 F.3d 1290, 1291-92 (7th Cir. 1993). The plaintiffs claim that because a regulation that requires permission to hold a political rally in a "public forum" (as the Chicago Park District's parks are conceded to be) imposes a "prior restraint" on the exercise of free speech, it must, to pass constitutional muster, be free of any

element of vagueness or uncertainty that might enable the regulation to be enforced in such a way as to deter or impede the exercise of this most celebrated of constitutional rights.

We do not find this a helpful formula. The historical referent of "prior restraints" is censorship, see 4 William Blackstone, *Commentaries on the Laws of England* 151-53 (1769), which the administration of a park system does not much resemble. The statement in the plaintiffs' brief that "denial of a permit to hold a rally is the ultimate censorship" is hollow rhetoric. It is a censor's business to make a judgment about the propriety of the content or message of the proposed expressive activity. Because he is in the business of suppressing such activity (friends of free speech are not drawn to a career in censorship), the danger of abuse is very great, especially when assessed in light of the dismal history of censorship. The regulation challenged here does not authorize any judgment about the content of any speeches or other expressive activity—their dangerousness, offensiveness, immorality, and so forth. It is not even clear that the regulation reduces the amount of speech. A park is a limited space, and to allow unregulated access to all corners could easily reduce rather than enlarge the park's utility as a forum for speech. See *Cox v.* New *Hampshire,* 312 U.S. 569, 574-76 (1941); cf. *Beal v. Stern,* 184 F.3d 117, 128-29 (2d Cir. 1999). Just imagine two rallies held at the same time in the same park area using public-address systems that drowned out each other's speakers. Cf. *Ward v. Rock Against Racism,* 491 U.S. 781 (1989). The heterogeneity of the practices that the "prior restraints" formula covers (with the present case compare *Freedman v. Maryland,* 380 U.S. 51 (1965), involving a movie censorship board)

is reason to doubt that it can provide much assistance to judges who have to decide a novel case.

The problem is general. General language, the language in which legal principles are couched, tends not to help much in the decision of cases in which weighty interests are on both sides of the balance that the court is asked to strike. Thus in this case there is, on the one hand, a danger in giving officials broad discretion over which political rallies shall be permitted to be conducted on public property, because they will be tempted to exercise that discretion in favor of their political friends and against their political enemies—and the advocates of legalizing the sale of marijuana and other controlled substances have very few political friends. But, on the other hand, a permit requirement is a sine qua non of managing a park system in a way that will preserve the value of the parks for the general public. Parks are primarily for recreation rather than for political and ideological agitation. They cannot be preserved in the primary use for which they are intended if any group can hold a rally of any size and length at any time with amplified sound of any volume. *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 296 (1984). Indeed, as we noted earlier, without regulation even the agitators might not be able to get their message across.

The competing interests cannot be weighed in the abstract in other than the grossest sense, and so a "correct" balance cannot be struck. This must give pause to any court minded to strike down a permit regulation on its face and so without consideration of its application to a particular event for which a permit was denied. A challenge to the wording as distinct from the actual

application of a regulation invites semantic nit-picking and judicial usurpation of the legislative drafting function in an effort to avert, without creating loopholes, dangers at best hypothetical and at worst chimerical. The problem is well illustrated by this case as we consider the plaintiffs' objections to the regulation, all of which the district court rejected en route to granting judgment for the park district after another panel of this court reversed the grant of a preliminary injunction. *MacDonald v. Chicago Park District,* 132 F.3d 355 (7th Cir. 1997).

The regulation authorizes the denial of a permit on a variety of grounds none of which has anything to do with the content of expressive activity. Chi. Park Dist. Code ch. VII § C5(e). One is that the applicant "has on prior occasions made material misrepresentations regarding the nature or scope of any event or activity previously permitted." The plaintiffs contend that the word "material" is excessively vague. The contention is frivolous. The word is one of the elemental legal terms, and is considered quite definite enough to form the keystone of criminal prohibitions against fraud. The residual vagueness that it shares with most words could be eliminated only by eliminating it from the regulation, but that would make the regulation more rather than less restrictive. The plaintiffs say that "misrepresentation" is vague too, and would prefer "falsehood." They have not suggested a substitute for "material" and so in effect they want us to rewrite the regulation so that it authorizes denying a permit to anyone who has told the park district a fib. All that their contention regarding the vagueness of "material misrepresentation" shows is the limits of language and so the inherent limitations of "facial" challenges.

They complain that the grounds for denial of a permit are permissive. The park district "may" deny a permit because of a misrepresentation, the failure to tender the fee, having damaged property of the park district on a previous occasion, or other grounds listed in the regulation, but it is not required to; it can forgive. The plaintiffs argue that this power of mercy arms the park district to pick and choose among applicants on political grounds. It indeed creates such a danger; but if this discretionary feature of the regulation were excised, the regulation would be more restrictive than it is (just as it would be if "falsehood" were substituted for "material misrepresentation"). This is another example of how free speech is so often on both sides of the balance in cases of the regulation as distinct from the prohibition of speech, a consideration that should make courts hesitant to invalidate such regulations. An even clearer example is a provision of the ordinance waiving the required permit fee for events protected by the First Amendment. The plaintiffs complain that this is vague, but do not indicate how it could be made less vague yet encompass the myriad activities that the First Amendment has been held to protect. Curtailing speech is an odd way of protecting speech.

The regulation requires applicants for permits to obtain liability insurance in the amount of $1 million to indemnify the park district against liability arising from a rally that might degenerate into a riot. (That is the amount of the policy, not the premium, which for the type of event envisaged by the plaintiffs would not exceed $1,200.) The plaintiffs argue ingeniously that since violence to person or property incidental to a political rally is likely to arise from the unpopularity of the cause

espoused by the rally's sponsors or speakers, the requirement of buying insurance amounts to a "heckler's veto," which the cases hold is not a proper basis for restricting free speech. *Forsyth County v. Nationalist Movement, supra,* 505 U.S. at 134-35; *Terminiello v. Chicago,* 337 U.S. 1, 4-5 (1949); *Cox v. Louisiana,* 379 U.S. 536, 551-52 (1965); *Chicago Acorn v. Metropolitan Pier & Exposition Authority,* 150 F.3d 695, 701 (7th Cir. 1998). But the amount of insurance required is not based on, or, so far as has been shown, influenced by, the nature of the event, and specifically by whether it involves controversial expressive activity likely to incite violence by onlookers or opponents. The required amount and the cost of the insurance depend only on the size of the event and the nature of the facilities involved in it (a bandstand, stage, tents, and so forth).

The park district requires that applications for permits be filed 30 days in advance – 60 days if special facilities are to be involved, such as sound amplification, which unless limited can violate the city's noise ordinance. The plaintiffs argue that these periods are too long and inhibit rallies responding to fresh news and startling events. But since thousands of permit applications are filed with the park district every year, it would be burdensome to require the park to process the applications in a significantly shorter time. The park district's policy, moreover, is to allow "spontaneous" rallies in reaction to current events. The opportunities for abuse are manifest but are minimized by the fact that if there is abuse the victims can bring a judicial challenge to the permit regulation as applied to them.

The plaintiffs reserve their strongest objection for

the regulation's failure to provide for searching judicial review of permit denials. They also complain about the absence of any deadline for the completion of such judicial review as the law affords them, not noticing the tension with their desire that the review be penetrating and meticulous – which takes time. In *Graff v. City of Chicago,* 9 F.3d 1309 (7th Cir. 1993) (en banc), the full court confronted the same issues of the adequacy and timing of judicial review in the context of an ordinance regulating newsstands on the city's sidewalks. The court was badly fractured, but counting noses one discovers that a majority believed that the judicial review procedure was good enough for a regulation of expressive activity when the regulation is not a form of censorship, that is, does not require or permit the regulatory authority to evaluate the content or message of the activity regulated. *Id.* at 1324-25 (plurality opinion), 1330-33 (concurring opinion). This regulation does not.

Review of agency action in Illinois is governed by an administrative procedure act (similar to the federal act, *International College of Surgeons v. City of Chicago,* 153 F.3d 356, 364 (7th Cir. 1998)) – but only if the statute creating the agency so provides. 735 ILCS *5/3-104.* If it does not so provide, and it does not with respect to the park district's denial of permit applications, the agency's action is reviewable only by means of a proceeding for common law certiorari. But this turns out to be a distinction without a difference. The proceeding is instituted in the same state court that would review the action under the administrative procedure act, *Smith v. Department of Public Aid,* 367 N.E.2d 1286, 1293 (1977), and although the standard of review is stated in different words from those used in that act, it amounts to the usual

substantial-evidence review that is familiar from administrative law. The reviewing court does not take evidence but relies on the record compiled in the administrative proceeding and seeks only to determine whether the agency's legal conclusions are correct and the agency's factual conclusions supported by substantial evidence, e.g., *Norton v. Nicholson,* 543 N.E.2d 1053, 1059 (III. 1989), or in other words not clearly erroneous. The review process is thus the same as under the state's administrative procedure act – as indeed the Supreme Court of Illinois stated in *Hanrahan v. Williams,* 673 N.E.2d 251, 253-54 (111. 1996).

The plaintiffs argue that the park district should in every case in which it denies a permit be required to seek judicial review *of its own action.* The argument is based on a misreading of *Freedman v. Maryland, supra,* 380 U.S. at 58-59, which holds only that the government may not regulate the content of speech without judicial authorization and so does not extend to time, place, and manner licensing systems. The Supreme Court made that clear in *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 228-230 (1990) (plurality opinion), *id.* at 244 (concurring opinion), *id.* at 249 (concurring and dissenting opinion).

But their principal complaint about the judicial-review procedure we've outlined, other than the lack of a deadline for the court's decision, is that there is no provision for an oral hearing. An applicant denied a permit can appeal the denial to the park district's superintendent, and submit any documents he wants, and the district must give written reasons for its action. But all submissions are in writing and therefore, the plaintiffs argue, the record compiled before the park district is

insufficient to enable meaningful judicial review of the superintendent's action. The argument is defeated by the plaintiffs' own emphasis on the importance of expedition. The regulation requires the park district to act on a permit application within 28 days and an appeal from the denial of such an application to be decided by the superintendent within 7 days. These deadlines are too tight to permit an evidentiary hearing with oral testimony, cross-examination, and the other accouterments of a trial. The plaintiffs have to choose between orality and expedition; they refuse to do so.

The entire emphasis on judicial review and evidentiary hearings is misplaced. If a person denied a permit for reasons that he believes violate the First Amendment is dissatisfied with a paper record reviewed in state court by means of common law certiorari, he has only to bring a suit in federal district court and if the matter is urgent to seek as these plaintiffs' predecessor (the deceased MacDonald) did a preliminary injunction. See *Patsy v. Board of Regents*, 457 U.S. 496 (1982); *Van Harken v. City of Chicago*, 103 F.3d 1346 (7th Cir. 1997); *Hameetman v. City of Chicago*, 776 F.2d 636 (7th Cir. 1985). Given that the plaintiffs have two remedies, one in state court and the other in federal court, the possible inadequacies of the state remedy, inadequacies in any event balanced by the expedition that barring oral testimony permits, are trivial.

The plaintiffs fear that the required expedition at the administrative level will be undone by foot dragging at the state court level, since there is no deadline on when the state court must render its decision in a common law certiorari proceeding. It is of course unusual though not

unknown to impose a time limit on judges, the fear being that it will both disrupt the orderly management of a judicial docket and conduce to hasty decision making. Since 42 U.S.C. § 1983, the statute under which federal constitutional claims are litigated in the federal courts, does not impose any requirement (with immaterial exceptions) of exhausting state judicial remedies, the victim of foot dragging in state court can always bring a parallel suit in federal court, complaining that the delay is denying him an adequate remedy for the violation of his constitutional rights.

Although a number of cases hold that judicial review of the denial of a permit must indeed be "deadlined," *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101-02 (9th Cir. 1998); *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988, 998-1001 (4th Cir. 1995) (en banc); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224-25 (6th Cir.1995); *Redner v. Dean*, 29 F.3d 1495, 1501-02 (11th Cir. 1994); contra, *City News & Novelty, Inc. v. City of Waukesha*, 604 N.W.2d 870, 881-82 (Wis. App. 1999), *cert. granted*, 120 S.Ct. 2687 (2000); *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 707-09 (5th Cir. 1994), they all involve special licensing regimes for sexually oriented businesses. They are based on Supreme Court cases involving censorship, such as the *Freedman* case cited earlier, or quasi-censorship, such as the ordinance at issue in *FW/PBS, Inc. v. City of Dallas, supra*, which required the licensing of such businesses. The government's evident concern with the content of the "speech" disseminated by such businesses argues for greater judicial vigilance than in time, place, and manner cases, in which our rejection of deadlining in *Graff*, 9 F.3d at 1324-25, stands uncontradicted. Cf. *Jews for Jesus, Inc.*

v. Massachusetts Bay Transportation Authority, 984 F.2d 1319, 1327 (1st Cir. 1993). Realism required recognition of the danger that state courts might drag their heels in deciding appeals by sexually oriented businesses from denials of licenses. The permit requirement at issue here is far more general and so far as appears the permits that are denied do not relate to controversial or unpopular expression. Especially in the absence of any showing, which has not been attempted, that the Chicago Park District is trying to restrict the expression of unpopular ideas or that the state courts are not acting with reasonable promptitude on appeals from permit denials, a more relaxed attitude toward the pace of judicial review is warranted than in the case of regulation targeted at unpopular expression. Cf. *Ward v. Rock Against Racism, supra,* 491 U.S. at 795; *Stokes v. City of Madison,* 930 F.2d 1163, 1170 (7th Cir. 1991); *MacDonald v. Safir,* 206 F.3d 183, 191 (2d Cir. 2000).

AFFIRMED

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 7, 2000
Before

Hon. Richard A. Posner, *Circuit Judge*
Hon. John L. Coffey, *Circuit Judge*
Hon. Frank H. Easterbrook, *Circuit Judge*

No. 99-1811

CAREN CRONK THOMAS and WINDY CITY HEMP DEVELOPMENT BOARD, Plaintiffs-Appellants,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
vs.	No. 97 C 2963
CHICAGO PARK DISTRICT, Defendant-Appellee.	George M. Marovich *Judge*

ORDER

On September 28, 2000 plaintiffs-appellants filed a petition for rehearing and petition for rehearing en banc and on October 24, 2000, defendant-appellee filed an answer. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing en banc. The petition is therefore
DENIED.

Dated: April 27, 1998
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT MACDONALD,	)	
	)	
Plaintiff,	)	
	)	No. 97 C 2963
v.	)	
	)	Judge George M. Marovich
CHICAGO PARK DISTRICT, a body political and corporate,	)	Magistrate Judge Arlander Keys
	)	
Defendant.	)	

TO: THE HONORABLE GEORGE M. MAROVICH
UNITED STATES DISTRICT COURT JUDGE

REPORT AND RECOMMENDATION

Before the Court is Plaintiff's Motion for Second Preliminary Injunction, pursuant to Federal Rule of Civil Procedure 65. Also before the Court are cross motions for partial summary judgment as to the "facial" challenges, and Defendant's motion for partial summary judgment concerning the "as applied" challenges. For the reasons set forth below, this Court recommends that the application for preliminary injunction, as well as each cross motion for partial summary judgment as to the "facial" challenges, be denied. However, the Court recommends that Defendant's motion for partial summary judgment as to the "as applied" challenges be granted.

BACKGROUND

Plaintiff, Robert MacDonald, and Defendant, the Chicago Park District (the "Park District") are once again before this Court in a continuation of their ongoing dispute concerning Mr. MacDonald's attempts to hold political rallies, addressing the legalization of marijuana, in Chicago's Parks (specifically Grant Park – at Butler Field adjacent to Petrillo Bandshell). For various reasons, Mr. MacDonald has been unable, at least during the past year, to obtain a permit from the Park District for his rallies.[1]

Mr. MacDonald challenges Chapter VII of the Park District's Permit Ordinance (the "Ordinance") both facially and as applied to him.

I. The Ordinance

Although the Park District may undoubtedly impose reasonable time, place, and manner restrictions as part of a facially neutral permitting scheme, the Ordinance provides numerous grounds for denial of a permit that appear to go beyond time, place, and manner restrictions. It is principally those grounds for denial of a permit to which Mr. MacDonald objects.

Section C(3)(a) of the Ordinance requires that a

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1. The Park District did recently grant, in part, a revised permit application for a rally to be held in August of 1998. *See, infra*, n.8.

group of more than fifty people that desires to assemble, or anyone who wishes to use amplified sound other than for his/her own personal enjoyment, obtain a permit for use of the public parks. An application for a permit must be submitted between ten to sixty days in advance of the event, depending on whether the event is a picnic, an athletic event, or a festival.

All applications must be accompanied by an application fee. Ordinance § C(4)(b). Additionally, §C(4) prescribes a substantial user fee, and also requires applicants to purchase liability insurance of at least one million dollars and to post a security deposit.[2]

With respect to the only written waiver provision contained in the Ordinance – § C(6) (c) – the Park District waives the user fee, the security deposit, and/or the insurance requirement (but not the application fee) if the permit is sought for activity "protected by the First Amendment" and the applicant is unable to pay. There is no definition in the Ordinance of what activities are "protected by the First Amendment of the United States Constitution." Ordinance § C(6)(c).

The Park District may, but is not required to, deny a permit for any number of reasons including an

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2. The Park District is supposed to make a decision regarding the permit application within fourteen days. Ordinance §C(5). However, it can extend the decision-making period for an additional fourteen days, without providing any reason for such extension.

applicant's: prior "material misrepresentations" about a permitted event; violations of a prior permit; material falsehoods" on the application; and prior damage to Park District property. *See* Ordinance, § C(5)(e). Although the foregoing bases for permit denial would appear to involve culpable misconduct, there is no requirement of proof or adjudication to determine whether such misconduct has occurred; it appears that the mere belief of the park District official that such misconduct occurred is enough to deny an application. Moreover, the Ordinance is silent on the issue of how long a person can be disqualified from getting another permit, based upon previous violations. The ban on speech and assembly arising from alleged prior misconduct conceivably could last a lifetime.

Notwithstanding its seemingly stringent permit scheme, the Park District sometimes allows more than fifty people to assemble, with artificial amplification of sounds, in the absence of a permit. These permitless events, though neither recognized nor exempted under the Ordinance, occur when there is a "spontaneous" demonstration, or where the Park District or City has "sponsored" an event. The Park District, apparently, makes an ad hoc determination as to whether to allow political rallies to occur (and to ignore/waive its own permit requirements).

For example, even though Mr. MacDonald had no permit for May 10 and 11, 1997, the Park District did not stop his rally and, in fact, helped him to plan for it. Further, he was allowed to use a bullhorn and other means of sound amplification, including portable speakers affixed to poles.

II. Mr. MacDonald's Rallies

In August of 1996, the Park District issued two permits to Mr. MacDonald to hold events similar to the one for which he now seeks a preliminary injunction. After the events, the Park District's Deputy General Counsel, Joan Fencik, gave Mr. MacDonald written notice that his security deposit would not be returned. That letter, dated September 17, 1996, explained that Mr. MacDonald's failure to arrange for portable toilets caused the Park District to incur expenses for delivery and use of such toilets during his events. Additionally, the Park District stated that it incurred expenses: to open and clean the underground bathrooms at Butler Field; to clean the stage and seating area at Butler Field (adjacent to Petrillo Bandshell) after the events; and to restore that seating area to its usual configuration. Finally, Ms. Fencik's letter noted that, at the events, multiple violations of the permits' terms occurred, including: alcohol consumption; unpermitted vendors; unpermitted vehicles; unpermitted tents and canopies; improper location of the generator, in violation of the fire code; and loitering by individuals who remained in the park past 11:00 p.m.

On March 4, 1997, Mr. MacDonald applied to the Park District for a permit to hold a rally and march on May 10 and 11, 1997. Ms. Fencik denied Mr. MacDonald's permit application by letter dated March 12, 1997. Ms. Fencik cited three reasons for denial of Mr. MacDonald's permit: (1) multiple violations of the two permits issued to him in August of 1996; (2) failure to provide proof of his unincorporated association's tax-exempt status; and (3) inability of his association to enter into contracts.

On March 18, 1997, Mr. MacDonald appealed the denial of his permit application to the Park District's General Superintendent. Mr. MacDonald contested all of the alleged previous violations. On March 24, 1997, the General Superintendent denied the appeal and affirmed Ms. Fencik's decision. On March 18, 1997, Mr. MacDonald filed an amended appeal, which the General Superintendent denied on March 26, 1997.

Mr. MacDonald's first motion for preliminary injunction was filed on April 25, 1997, together with the Verified Complaint for Declaratory Judgment and Permanent Injunction.[3] Mr. MacDonald requested an emergency preliminary injunction compelling the Park District to issue a permit for a rally to be held on May 10 and 11, 1997 (from noon until 10:00 p.m. each day). On May 9, 1997, this Court issued a Report and Recommendation, which concluded that Mr. MacDonald's emergency application for a preliminary injunction should

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3. This matter is brought under 42 U.S.C. §1983, and alleges a violation of rights secured by the First Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment. In the underlying Verified Complaint for Declaratory Judgment and Permanent Injunction ("Complaint")– which challenges the Ordinance both facially and "as applied" – Mr. MacDonald seeks a declaration that the Park District's grounds for permit-denial, set forth in § C(5)(e) of the Ordinance, is unconstitutional. Mr. MacDonald also seeks an injunction permanently prohibiting the Park District from enforcing that portion of the Ordinance.

be denied due to his delay in seeking that relief.[4]

Although no preliminary injunction issued, Mr. MacDonald held a rally on May 10 and 11, 1997. During the rally, the Park District cooperated with him, and assisted him by opening up bathrooms, bringing in garbage cans, and allowed him to use a bullhorn and other sound amplification. No trespassing or other complaint was made against Mr. MacDonald for this event.

On May 23, 1997, Mr. MacDonald filed his second application for a preliminary injunction, requesting an order enjoining the Park District from enforcing its permit ordinance, and permitting him to hold a rally on August 23 and 24, 1997.[5] On July 2, 1997, the parties consented to the exercise of jurisdiction by this Court concerning the second application, and on July 21, 1997, an evidentiary hearing was held. In its Memorandum Opinion and Order of August 15, 1997, this Court granted in part, and denied in part, the preliminary injunction.[6] *MacDonald v. Chicago Park Dist.*, 976 F.Supp. 1125 (N.D. Ill. 1997). On appeal,

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4. On May 30, 1997, the District Court adopted the Report and Recommendation.

5. In supporting memoranda, Mr. MacDonald also sought to enjoin § C(3) of the Ordinance and to compel the Park District to also allow a rally on May 9 and 10, 1998. He did not submit a permit application for either proposed rally.

6. The Order was amended on August 19, 1997.

the Seventh Circuit vacated the preliminary injunction, finding that it was overly broad, and that the balance of harms tipped in favor of the Park District due to the fact that Mr. MacDonald could hold spontaneous rallies (and therefore was not harmed by the permit denial). *MacDonald v. Chicago Park Dist.*, 132 F.3d 355 (7th Cir. 1997).

Currently, Mr. MacDonald requests, in his third application,[7] a preliminary injunction compelling the Park District to issue a permit for a political rally he plans to hold on May 9 and 10, 1998.[8] Mr. MacDonald again seeks to hold the rally – referred to as "Windy City Hempfest" – at Butler Field, near Petrillo Bandshell. (Pl.'s Mot. 2d Prelim. Inj., Ex. A.) Similar to his previously planned events, the rally is expected to draw between 8,000 and 12,000 people. *(Id.)*

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7. Although his motion is entitled "Second Preliminary Injunction", the motion at bar represents Mr. MacDonald's third attempt at preliminarily enjoining the Park District.

8. Mr. MacDonald also sought to hold a political rally on August 22 and 23, 1998, however the parties indicated that they have already resolved that dispute. In fact, the Park District granted, in part, Mr. MacDonald's "revised" permit application for those dates. (Def.'s 12(N), Exs. I, J.) Therefore, the Court will not address the application for those dates.

Mr. MacDonald applied, on the very first day possible (January 2, 1998), for a permit to hold the May 9 and 10, 1998 rally. The application was denied on January 15, 1998. (*Id.* at Exs. A, B.) The Park District's reasons for denial included the fact that Petrillo Bandshell was not available for rental in 1998, and that Butler Field was unavailable for "permit events" due to drainage and turf problems/damage. (*Id.* at Ex. B.) The Park District indicated that there was no area in Grant Park that could accommodate the number of people expected, and that Soldier Field's parking lots were unavailable because of a soccer match. (Pl.'s Mot. 2d Prelim. Inj., Ex. B.)

Additionally the Park District noted the other potential deficiencies in the application[9] that would have to be remedied before a permit could be issued. For example, there was no financial information supporting the request for a waiver of insurance and fees. (Pl.'s Mot. 2d Prelim. Inj. at Ex. B.) Mr. MacDonald did not appeal the denial of this permit application to the General Superintendent. (Def.'s Rule 12(N), Ex. H.)

DISCUSSION AND FINDINGS

I. Motion for Preliminary Injunction

To prevail on a motion for a preliminary injunction,

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9. This is not the first time that the Park District has pointed to such deficiencies in Mr. MacDonald's permit applications. The deficiencies are inexplicable given the history of litigation between the parties.

the movant must initially clear a threshold requirement by showing that: (1) the case has a reasonable likelihood of success on the merits; and (2) there exists no adequate remedy at law and the movant will suffer irreparable harm if the preliminary injunction is not granted. Mu-Mar Shoe Co. v. *Shonac Corp.*, 75 F.3d 1153, 1156 (7th Cir. 1996); *see also Storck USA, L.P. v. Farley Candy Co.*, 14 F.3d 311, 313-14 (7th Cir. 1994). If these conditions are met, the initial threshold has been cleared and the court must next: (3) balance the irreparable harm to the movant if the injunction is denied, against the harm to the non-movant if it is issued improvidently; and (4) after weighing the interests of the parties, additionally consider the public interest (*i.e.* non-parties) consequences of either a grant or denial of the injunction. *Mu-Mar*, 75 F.3d at 1156; *see also Storck*, 14 F.3d at 314.

A. "Facial" Challenge

With respect to Mr. MacDonald's "facial" challenge to the Ordinance, and his desire for a preliminary injunction addressing that challenge, the Seventh Circuit has clearly held that a preliminary injunction is unwarranted. *MacDonald*, 132 F.3d at 355. In reviewing this Court's previous injunctive order, the Seventh Circuit held that, in balancing the harms to the parties, the harm to Mr. MacDonald was limited since he can still hold a "spontaneous" rally, pending resolution of this case. *Id.* at 358. The Park District has unequivocally represented to this Court, and the Seventh Circuit, that it will not interfere with any such "spontaneous" rally that Mr. MacDonald may hold. So far, there is no evidence of imminent harm "e.g. (evidence of] the Park District (both] . . . deny[ing] MacDonald a permit for his May 1998 rally

and attempt ting] to prevent that rally from occurring . . . ." *Id.* (emphasis added). Therefore, as to his "facial" challenge, Mr. MacDonald's application for preliminary injunctive relief must fail in light of the Seventh Circuit's holding.

B. "As Applied" Challenge

It is not clear whether Mr. MacDonald is pressing his "as applied" challenge. However, in the interest of maintaining a complete record, the Court will address Mr. MacDonald's "as applied" claims, as well. With respect to his "as applied" challenge to the Ordinance, the Court notes that Mr. MacDonald failed to appeal the January 15, 1998 denial of his permit application. This failure to exhaust administrative remedies is, in the absence of additional evidence,[10] fatal to any "as applied" challenge. Therefore, for any "as applied" challenge, Mr. MacDonald's application for preliminary injunctive relief must fail because he has no likelihood of success on the merits.

C. Recommendation

Mr. MacDonald cannot clear the initial, threshold requirement by showing that: (1) the case has a reasonable likelihood of success on the merits; and (2) there exists no adequate remedy at law and he will suffer

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10. Mr. MacDonald might have been able to argue that the denial was pretextual, and that any appeal would have been futile. However, he provided no evidence that the reasons given by the Park District, in denying this particular permit application, were pretextual or applied differently to him compared to other applicants.

irreparable harm if the preliminary injunction is not granted. Therefore, the Court recommends that his third application for a preliminary injunction be denied.

II. Motions for Summary Judgment

The parties have filed cross motions for partial summary judgment as to Mr. MacDonald's facial challenge to the Ordinance. Additionally the Park District has moved for partial summary judgment as to Mr. MacDonald's as applied challenge to the Ordinance.

Under the Federal Rules of Civil Procedure, summary judgment is appropriate when "there is no genuine issue as to any material fact, and . . . the moving party is entitled to a judgment as a matter of law." FED. R. Civ. P. 56(c).

The initial burden is on the moving party to identify "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986) (*citing* FED. R. CIV. P. 56(c)). The non-movant then has the burden of providing specific facts, showing a genuine issue "open for trial." *Rush v. McDonald's Corp.,* 966 F.2d 1104, 1109 (7th Cir. 1992); see also *Waldridge v. American Hoechst Corp.,* 24 F.3d 918, 920 (7th Cir. 1994) (stating that exclusive reliance on the allegations in the pleadings is insufficient to survive summary judgment). Summary judgment should not be granted if there is sufficient evidence for a jury verdict in favor of the non-moving party. *Anderson v. Liberty Lobby,* 477 U.S. 242, 249 (1986); *County of Vernon*

v. United States, 933 F.2d 532, 534 (7th Cir. 1991). In deciding a motion for summary judgment, the Court must view all facts in the light most favorable to the non-moving party. *Griffin v. Thomas,* 929 F.2d 1210, 1212 (7th Cir. 1991)

A. Park District's Motion for Summary Judgment – "As Applied" Challenge

The Park District moves for summary judgment as to Mr. MacDonald's "as applied" challenges to the Ordinance. The Park District maintains that Mr. MacDonald has not establish content-based discrimination as to any of the events for which Mr. MacDonald made permit applications that were denied. The only ripe permit denial for which he has "as applied" standing is the application for May 10 and 11, 1997."[11] The Park District's denial of that application appeared to be based upon a provision of the Ordinance concerning prior violations (which will be addressed, below, during discussion of the "facial" challenge). However, Mr. MacDonald was allowed to hold a "spontaneous" rally on May 10 and 11, 1997 despite the denial of his permit. The dispute involving the May 10 and 11, 1997 rally is, therefore, moot, and the Court recommends that Defendant's motion for partial summary judgment as to the "as applied" challenge be granted.

B. Cross Motions for Partial Summary Judgment – "Facial" Challenge

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11. For all his other events, he either did not apply for a permit or did not fully exhaust the appeals process prescribed by the Ordinance.

Prior restraints exist "when a regulation '[gives] public officials the power to deny use of a forum in advance of actual expression.' " *Stokes,* 930 F.2d at 1168 (quoting *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 553 (1975)). Prior restraints forbid expression before it takes place, in contrast to a subsequent punishment for expression after it occurs. It is clear that the Park District's Ordinance is a prior restraint, because under § C(5)(e), the Park District may deny use of traditional public fora in advance of actual expression or assembly.[12]

"[T]he Constitution requires that the [Park District] establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered." *City of Lakewood v. Plain Dealer Publ'g Co.,* 486 U.S. 750, 760 (1988). A regulation that may be arbitrarily applied has the potential to improperly suppress disfavored speech or disliked speakers. *Forsyth County, Ga. v. Nationalist Movement,* 505 U.S. 123, 131 (1992) (holding ordinance unconstitutional where it permitted county official to examine contents of message and to correspondingly vary fees for assembly/parades to reflect cost of maintaining public order with respect to the particular message).

In *City of Lakewood v. Plain Dealer Publishing Co.,*

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12. In this respect, also, the case at bar differs from *Graff v. City of Chicago,* 9 F.3d 1309 (7th Cir. 1993) (*en banc*), *cert. denied,* 511 U.S. 1085 (1994), because in *Graff,* the plurality opinion (by five of the twelve Judges) determined that operating a newsstand did not directly involve free speech rights.

the Supreme Court invalidated an ordinance as an unconstitutional prior restraint because the ordinance allowed the city to deny a permit – to place newsracks on public property – for any reason, and did not impose a time limit on the decision to grant or deny a permit. The Supreme Court held that the ordinance unconstitutionally gave the deciding official too much discretion.

Unfortunately, here, neither party has addressed in its Local Rule 12(M) or (N) Statements the Park District's historical pre- litigation practices and/or interpretations of the Ordinance, which are essential to determine the degree of discretion enjoyed by the Park District. It is principally the failure of this proof that necessitates the denial of both motions for summary judgment as to the "facial" challenge.

1. Park District's Motion

a. *The Seventh Circuit's Opinion Does Not Foreclose MacDonald's Claims*

The Park District contends that the Seventh Circuit's opinion, vacating this Court's grant of a preliminary injunction, mandates summary judgment in its favor with respect to the "facial" challenge. The Park District argues that the Seventh Circuit "rejected" the "unlimited discretion" argument and "held that section C.5.e. is content-neutral." (Def.'s Mem. Supp. Mot. Summ. J. on Facial Challenge, at 1.) The Park District is wrong.

The Seventh Circuit "emphasize[d] . . . that the decision to grant or to deny a preliminary injunction 'is not a decision on the merits of the plaintiff's suit.'" *MacDonald,* 132 F.3d at 357-58 (quoting *Ayres v. City of Chicago* 125 F.3d 1010, 1013 (7th Cir. 1997)). The Seventh Circuit specifically noted that it was not "suggest[ing] that the permit procedure is itself constitutional simply because it may not be strictly enforced. Our discussion here relates solely to the harm MacDonald would incur from enforcement of the challenged sections of the Code while his lawsuit is pending." *Id.* at 358 n.3. In concluding its opinion, it "emphasized again . . . that today's decision is not one on the merits of any of MacDonald's claims, including the two we have specifically discussed. MacDonald may well be able to establish on a more complete record that at least one or more provisions of [the Ordinance] are facially invalid under the First Amendment." *Id.* at 363 (emphasis added). Although the Seventh Circuit did note – while balancing the harms during its analysis of the preliminary injunction – that *Graff* "poses a substantial obstacle" for Mr. MacDonald, it specifically stated that it was "not definitively resolv(ing] the matter . . . at the preliminary injunction stage . . . ." *MacDonald*, 132 F.3d at 362. This Court takes the Seventh Circuit at its word. Thus, the Seventh Circuit's discussion of Mr. MacDonald's likelihood of success on the crucial issue – the Ordinance's constitutionality – did not determine, or even suggest, that *Graff* foreclosed Mr. MacDonald's underlying Complaint (or eradicated all likelihood of success on the merits).

The Park District's motion for summary judgment on the "facial" challenge could be denied out of hand,

since it is premised entirely on the mistaken notion that the Seventh Circuit's opinion vacating this Court's preliminary injunction foreclosed any facial challenge to the Ordinance. Nevertheless, because the Seventh Circuit did not find Mr. MacDonald's likelihood of success to be as great as this Court did during its analysis on preliminary injunctive review, the Court will carefully examine the reasons the Seventh Circuit gave for not finding an overwhelming likelihood of success on the merits. In light of the Seventh Circuit's finding that Mr. MacDonald has less than an overwhelming likelihood of success – even though not binding – further consideration and analysis of *Graff* is warranted. Thus, the discussion turns to *Graff;* specifically why *Graff* does not mandate summary judgment on Mr. MacDonald's "facial" challenge.

b. *Graff v. City of Chicago*

In *Graff,* a news vendor brought an action challenging the constitutionality of a Chicago ordinance that required the licensing of sidewalk newsstands. 9 F.3d at 1311. For approximately seventy years, a newsstand stood, on a public walkway, in front of the City of Chicago Cultural Center. *Id.* The plaintiff operated his business there starting in July of 1984, when he purchased the stand for more than fifty thousand dollars. *Graff,* 9 F.3d at 1311. At the time he purchased the newsstand, the City ostensibly required newsstand operators to acquire permits. *Id.* Those permits were issued at the discretion of the commissioner of streets and sanitation, and could be revoked at any time by the mayor. *Id.* The City's permitting ordinance stated that newsstands could only sell Chicago papers, provided the mayor with no standards

to guide his discretion, and lacked hearing procedures to review decisions denying or revoking permits. *Id.* The plaintiff attempted to apply for a permit, without success, although permits were issued for other newsstands at other locations. *Id.*

In November of 1990, the City gave the plaintiff two months' notice to remove his newsstand from the sidewalk. *Id.* Although the order was later rescinded, the plaintiff filed a complaint against the City and the mayor, alleging that the ordinance violated the First and Fourteenth Amendments. *Id.* The City amended the ordinance, rather than attempting to defend it; and then argued that the complaint should be dismissed because the new ordinance corrected all constitutional deficiencies. *Id.* Under the new ordinance, the reasons for denial of a permit were things such as whether the design and materials comported with the character of the streetscape and the extent to which services offered by the newsstand are already available in the area. *Id.* at 1317-18. The new ordinance only applied to initial permit applications; renewals were quasi-automatic. *Graff,* 9 F.3d at 1329-30.

However, the plaintiff amended his complaint and made a facial challenge to the new ordinance. *Id.* at 1311. In May of 1992, the City – after consistently objecting to the size and construction materials used in the newsstand – notified the plaintiff that it intended to remove his newsstand from the sidewalk in fifteen days. *Id.* at 1312. The plaintiff applied for a preliminary injunction, which the district court denied. *Id.* A Seventh Circuit panel reversed the district court, holding that the new ordinance failed to provide sufficient judicial oversight, in violation of the First Amendment, per *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215 (1990) (holding city's ordinance regulating

adult entertainment businesses was an unconstitutional prior restraint because it failed to provide an effective time limitation on the licensing decision and also failed to provide for prompt judicial review). 9 F.3d at 1312. A petition for rehearing *en banc* was then granted. The Seventh Circuit, sitting *en* banc, held that the City's permit ordinance was constitutional, and vacated the panel opinion. *Id.* at 1313. However, the reasoning of the en *banc* panel differed, and the case produced two concurrences and a dissent, in addition to the plurality opinion. *Id.*

Two major issues were discussed in the opinions of the *en banc* panel: first, whether the ordinance was unconstitutional because there was too much discretion given to the City in deciding whether or not to grant permits; and second, whether there were adequate procedural safeguards available, *e.g.* judicial review. A careful analysis of *Graff* reveals that the Seventh Circuit's rulings do not foreclose Mr. MacDonald's claims on either of these issues.

(1) *Discretion*

As to the first issue – too much discretion - the plurality opinion (written by Judge Manion, and joined by Judges Posner, Coffey, Easterbrook, and Kanne) held that the City's discretion under the ordinance was limited, and did not raise constitutional concerns under prior restraint

analysis.[13] However, that holding does not control the case at bar, because the discretion granted to the City in *Grafff* was limited to aesthetic and safety determinations, in contrast with the broad (and punitive) discretion granted to the Park District under the Ordinance, and because the ordinance in *Graff* applied only to the first permit application. Each of these distinctions will be discussed in turn.

(a) *Comparison Between the Ordinance and the Graff Scheme*

The discretion the City had in *Graff* was limited to things such as aesthetics and safety. 9 F.3d at 1317-18, 1329. There was no facially evident unbridled discretion to deny the permit based upon prior conduct or speech. *Graff*, 9 F.3d at 1318, 1329.

This Court, in its earlier Memorandum Opinion and Order, found three primary sources of discretion in the Ordinance that give the Park District substantial power (whether or not exercised) to censor based on the content or viewpoint of speech: discretion to deny permit applications; discretion as to the fees and expenses imposed on permittees; and discretion as to the time taken to process an application.

Mr. MacDonald's primary challenge is centered on

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13. The plurality initially found that the ordinance did not constitute a prior restraint, but proceeded to analyze it as a prior restraint anyway. *Id.* at 1313.

§ C(5)(e). Section C(5)(e) concerns contents of notice and grounds for denial of a permit, and reads as follows:

> To the extent permitted by law, the Park District may deny an application for permit if the applicant or the person on whose behalf the application for permit was made has on prior occasions made material misrepresentations regarding the nature or scope of an event or activity previously permitted or has violated the terms of prior permits issued to or on behalf of the applicant. The Park District may also deny an application for permit on any of the following grounds:
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> (1) the application for permit . . . is not fully completed and executed;
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> (3) the application for permit contains a material falsehood or misrepresentation; . . .
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> (5) the applicant or the person on whose behalf the application for permit was made has on prior occasions damaged Park District property and has not paid in full for such damage, or has other outstanding and unpaid debts to the Park District; . . . [or]
>
> (11) the use or activity intended by the applicant is prohibited by . . . the regulations of the General Superintendent . . . .

(emphasis added).

The Park District appears to have available, under

this subsection, at least four alternative means of exercising discretion. First, the Park District has discretion to determine what conduct constitutes a material misrepresentation, a violation of a prior permit, a material falsehood on an application, or damage to Park District property on a prior occasion (collectively referred to herein as "alleged misconduct"). Second, the Park District decides who was responsible for the alleged misconduct. Third, assuming that there is some basis advanced under § C(5)(e) to deny a permit, the Park District also may have discretion to decide which applications to deny, and which to permit, despite alleged misconduct.[14]

There are no objective criteria in the Ordinance for determining the existence of alleged misconduct and its effect on permit seekers. There is also no provision for what type of evidence is required to prove alleged misconduct, or even that any proof is necessary.[15] Further, it is not even clear who at the Park District is designated to make these determinations. This provision could allow any Park District employee to make a notation

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14. The subpart regarding a "complete" permit, and the one specifying denial for activities prohibited by regulations of the General Superintendent, also are subject to discretion.

15. An honest error in completing an application could be a material misrepresentation in the eyes of the Park District. An incorrect projection about crowd size could also be one. If an application predicted hundreds of attendees, but thousands showed up, this too could count as a material misrepresentation.

in a file that he/she found or somehow learned (perhaps from hearsay), that a person who obtained a permit and held a rally violated some provision of the Ordinance.

Additionally, there is no provision for notifying an individual, who engaged in alleged misconduct, that the Park District has made such a determination. Almost any prior permittee could be alleged (rightly or wrongly) to have "damaged" park property, if only by trampling the grass. The only way for that person to find out about the Park District's determination is when he/she (next)[16] applies for a permit. There is no opportunity or procedure in place for such an individual to challenge the Park District's determination – at least not until after a permit is applied for, and then denied, based upon those reasons.

Even more troubling, there is no limit on how long an instance of alleged misconduct can cause an individual to be barred from obtaining a permit. The Ordinance provides no maximum penalty time; there is absolutely no cut-off point or end in sight. Thus, it appears that the Park District could choose to exercise its discretion to prevent someone from ever, in his/her lifetime, getting a permit (again). This subjective determination could be even more invidious due to the fact that permit seekers whose audiences have caused prior permit violations (and therefore alleged misconduct vis a vis the permittee) are likely those whose speech generates the most public

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16. The Park District could also state alleged misconduct as a reason for turning down a first time permit applicant, if, for example, the applicant was alleged to have spray painted graffiti on Park District property.

outcry. This ability to censor individuals based on the mere allegation of prior misconduct is a far cry from the City's ability in *Graff* to dictate the number of newsstands and the materials used in the construction of such newsstands.

Section C(4)(c) states that no permit shall be granted unless the applicant has:

> executed an agreement with the Park District [promising] to bear all costs of policing, cleaning up and restoring the park upon conclusion of the event or activity; to reimburse the Park District for any such costs incurred and to indemnify the Park District and hold the Park District harmless from any liability to any person resulting from any damage or injury occurring in connection with the permitted event proximately caused by the action of the permittee, the sponsoring organizer, its Officers, Employees or agents or any person under their control insofar as permitted by law.

(emphasis added).

This provision conditions the issuance of a permit on the ability of the applicant to pay for injuries and damage resulting from speech and assembly. The indemnification and reimbursement expenses depend upon the crowd's reaction to the speech and assembly. Thus, by requiring the permit applicant to personally bear the cost of his/her public rally, the conveyance of unpopular messages could be chilled. This provision could

dissuade speakers from using public parks for political speeches because of a fear of huge financial consequences. This regulation could be used to punish a speaker for attracting too many followers – a large crowd might result in a speaker being held responsible for trampling of grass and could result in charges for resodding the park. Contrastingly, an unpopular speaker may be assessed the costs of cleaning up broken bottles thrown at him by the angry crowd. Moreover, the Ordinance also requires the applicant to guarantee in advance that, if the crowd is hostile to his/her message and resultingly requires a large security contingent, he/she will pay for that "policing." That requirement appears to contravene *Forsyth*'s holding that the cost of maintaining order cannot be passed on to those wishing to demonstrate in a public forum as a pre-condition of the granting of a permit. Nothing in the ordinance at issue in *Graff* would have imposed such onerous financial burdens on the exercise of speech in a public forum.

Section C(4)(d), concerns security deposits and states:

> no application for permit shall be granted unless the applicant has paid . . . the security deposit in an amount in accordance with the schedule of fees . . . The amount of the security deposit set in the schedule of fees shall be equal to the estimated cost of policing, cleaning up, and restoring the park upon the conclusion of the use or activity. . . . Promptly after the conclusion of a permit activity, the Park District shall inspect the premises and equipment used by the permittee.

> (2) If it is determined by such inspection, that the permitted event proximately caused damage . . . or . . . that fines should be assessed . . . the Park District shall retain the security deposit or any portion, thereof, necessary to pay for the cost repair or any fines assessed against the permittee. . . .

Again, similar to § C(4)(b), there are concerns about the differing categorizations and amounts. Also, like §C(4)(c), the costs imposed here go, in part, towards "policing" the event. Additionally, the Park District cannot, and does not, determine whether the debris or graffiti being cleaned up is from the speaker or, rather, from an unruly crowd, not under the permittee's control. The Park District's schedule of fees provides that security deposits triple for organizations which have forfeited their security deposits at prior events. This punitive trebling of the security deposit seems to be another penalty imposed for the crowd's reaction to a previous message. As the Supreme Court explained in *Forsyth*, a regulation was invalid because "[t]hose wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit." *Forsyth*, 505 U.S. at 134. "Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." *Id.* at 134-35. Nor can an applicant's future speech be barred outright because prior speech has offended such a mob.

Section C(4)(e) states that '[n]o application for permit shall be granted unless the applicant has paid . . . a user fee . . . ." Again, similar to those provisions

discussed above, the amounts per category, on the schedule of fees, for user fees differ and the categorization of events appears subjective. This discretion – if the choice is made by the Park District and not the permit applicant – to categorize an event, combined with the extreme variations of user fees, strongly indicates that the Park District is attempting to impose a tax or raise revenues, rather than merely recover its administrative expenses for paperwork; although this determination will have to await trial.

Section C(4)(f) imposes a hefty insurance requirement on applicants:

> Applicant shall procure and maintain at all times during its use of Park District property, insurance in such amounts and with such coverages as shall reasonably be required by the Park District .... The Division of Risk Management shall prepare a uniform schedule of insurance guidelines for particular types of activities. Applicant shall provide Park District with a certificate from an insurer evidencing such coverage prior to applicant's use of Park District Property . .

Although the insurance requirement is waivable in some discretionary cases, there is no provision for waiver if the applicant is unable to obtain insurance because no company will provide it. This provision appears to allow the Park District to pass along its discretion to the insurance companies; the insurance providers decide whether an event is too risky to insure, and may (and likely will) make their determination based on the

message/content of the event. Those with unpopular views (especially those likely to receive a negative response from the public) will have a difficult (if not impossible) time getting insurance, or it will cost them much more. *See Collin v. Smith,* 447 F. Supp. 676, 684 (N.D. Ill. 1978) (insurance was beyond the reach of Nazi organization because "insurance companies are simply not interested in writing the kind of policy required due to the unknown risks involved . . . ."), *aff'd,* 578 F.2d 1197 (7th Cir. 1978), *cert. denied,* 439 U.S. 916 (1978); see also *Pritchard v. Mackie,* 811 F. Supp. 665, 668 (S.D. Fla. 1993) (insurance requirement "fails to take into account the possibility that the most heinous political groups in American society may find it difficult, if not impossible to actually purchase insurance.").

The Park District is not required to assist an applicant in obtaining insurance, but it sometimes chooses to help, itself an indication that insurance is sometimes difficult to obtain. In *Graff* there was no requirement of insurance in order to have a newsstand.

Finally, § C(6)(c) provides for waiver, but such waiver is totally discretionary:

> Any requirement for a user fee, security deposit, or certificate of insurance shall be waived by the General Counsel, if the activity is protected by the First Amendment of the United States Constitution and the requirement would be so financially burdensome that it would preclude the applicant from using Park District property for the proposed activity . . . .

(emphasis added).

Thus, if the Park District's General Counsel, Ms. Fencik, determines that an activity is "protected" and that the user fee, security deposit, or certificate of insurance is financially overburdensome, then those requirements are waived. There is no definition of what are "protected" activities. Presumably, all speech and assembly are protected by the First Amendment, but such a reading of the Ordinance would render the "protected by the First Amendment" language superfluous."[17] This ability to grant or deny a waiver based on the Park District's determination as to whether an activity is protected by the First Amendment, is precisely the type of discretion absent in *Graff* – that the concurring opinion of Judge Flaum stated would violate the First Amendment. *See Graff,* 9 F.3d at 1333.

"Freedom of speech . . . [is] available to all, not merely to those who can pay their own way." *Murdoch v. Pennsylvania,* 319 U.S. 105, 111 (1943). The Park District cannot generate profits/revenues by taxing the exercise of First Amendment Rights. "A state may not impose a charge for the enjoyment of a right granted by the federal constitution." *Murdoch,* 319 U.S. at 113. This is doubly true when the fees imposed are discretionary, based on what permittees are seeking. The discretion available under these provisions could make the Ordinance

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17. It appears that the Park District must engage in forbidden discretion in making First Amendment determinations, *Cf., infra,* n.20.

unconstitutional. Again, in contrast, the permit scheme in *Graff* did not appear to give the City any discretion as to permit fees or waivers thereof.

The time for processing applications raises concerns as well. Section C(5)(b) states that all conditions precedent to the issuance of a permit "must be completed at least thirty days prior to the event unless a longer time period is prescribed by the General Superintendent." (emphasis added). Section C(5)((C) provides the Park District with a period of up to twenty-eight days within which to grant or deny a permit:

> If no written denial or conditional approval is issued within fourteen days of the date on which a permit application is fully completed, executed and filed with the appropriate Officer or Employee the application shall be deemed to have been granted a conditional approval Provided, however, the Park District may extend the period of review for an additional fourteen days by issuance of a written notice of extension.

(emphasis added).

"[T]iining is of the essence in politics . . . and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all." *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 163 (1969) (Harlan, J., concurring). A one or two day delay may be intolerable when applied to political speech on a topical issue; where the element of timeliness is essential. Since an enthusiastic crowd can serve to sway the

undecided, even a simple delay in getting that message out could permanently vitiate the expressive content of a demonstration.

Here, the sixty-day advance application requirement for festivals, set forth in the schedule of fees, is extraordinarily long. Even the thirty-day advance application requirement in the Ordinance is too long – it infringes on expressions concerning current events. Furthermore, the procedure for appeal of a denial, §C(6)(a)*(2)*, gives the General Superintendent seven days within which to serve notice of his decision. Section C(6)(a)(2) states:

> The General Superintendent shall have seven days from the date on which the appeal was received in which to serve upon the applicant a notice that he/she has affirmed, modified or reversed the denial or retention of security deposit . . . .

Even if someone who applied thirty days in advance and was subject to the fourteen day extension received a notice of denial in the mail at the very last minute, the application could still be moot, since the appeal process would still have seven days to run. Thus, this seven-day appeal provision increases the Park District's ability to exercise discretion over the permitting process.

(b) *The Ordinance in Graff Applied Only to the Initial Permit Grant*

As the concurring opinion of Judge Flaum (joined by Judge Cudahy) notes, even the limited discretion in

Graft would have been unconstitutional had it also been applied in a permit renewal situation, rather than only to initial permit grants. 9 F.3d at 1329-30. In *Graff,* once the initial permit was granted, the renewal was virtually automatic. *Id.* at 1318 n.5. This *pro forma* license renewal situation did not clearly allow opportunity for a licensing official to suppress speech based upon prior speech. The licensing official would not know what the vendor planned to sell (or sold) until after the initial permit issued. However, if the same criteria (as applied to first time license applicants) also was applied to license renewals, then it would have raised constitutional concerns because of a danger that the licensing officials would use aesthetic or safety issues as " "post hoc rationalizations'" to justify otherwise unlawful suppression of speech (which is exactly what Mr. MacDonald is alleging happened to him). *Graff*, 9 F.3d at 1328 (quoting *City of Lakewood,* 486 U.S. at 758. The case at bar is much like the renewal situation envisioned by Judges Cudahy and Flaum; in fact, under the Park District's Ordinance, an applicant's prior permit experiences are expressly held against him as a basis for permit denial.

Therefore, the situation in *Graff* also differed from the one at issue here because the grants of permits in *Graff* were much more limited, and the decisionmaker's discretion applied only to the initial permit grant and not to renewals thereafter.

(2) *Judicial Review*

With respect to the second issue in *Graff* – adequate procedural safeguards – the Seventh Circuit's holding is unclear. Although the plurality of five (Judges

Posner, Coffey, Easterbrook, Manion, and Kanne) held that a common law writ of certiorari was an adequate safeguard for a prior restraint, it does not appear that any of the concurring (or dissenting) Judges agreed. *See 11126 Baltimore Blvd., Inc. v. Prince George's County, Md.*, 58 F.3d 988, 1000 n.17 (4th Cir. 1995) (discussing *Graff* and determining that the majority of the Seventh Circuit did not hold that the prompt judicial review requirement is satisfied when common law certiorari is available). Instead, it appears that at least five Judges found that a common law writ of certiorari would not satisfy First Amendment concerns – (the three dissenters – Judges Cummings, Bauer and Fairchild, as well as concurring Judges Cudahy and Flaum). Concurring Judges Ripple and Rovner did not explicitly address the issue, but seemed to agree with the dissent that the "literal" strict application of *FW/PBS* and *City of Lakewood*, would lead to an invalidation of the City's ordinance. *Graff*, 3 F.3d at 1333-35 (Judge Ripple, with Judges Cudahy and Rovner concurring).[18]

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18. However, they also found that *FW/PBS* and *City of Lakewood* were inapplicable to the particular City ordinance because of an absence unbridled discretion.

19. In *Freedman*, the Supreme Court held that a statute, requiring the submission of movies to state censors before exhibition, was an unconstitutional prior restraint on expression because it lacked judicial participation and gave no assurance of prompt judicial review. 380 U.S. at 51. *Freedman* held that, in order to provide proper safeguards, the censor (not the exhibitor) would have the burden of instituting judicial proceedings, and then

Additionally, the concurring opinion of Judge Flaum, joined by Judge Cudahy, expressly rejected the plurality's view. That concurring opinion stated that a common law writ of certiorari was not the sort of review that *Freedman v. State of Maryland*, 380 U.S. 51 (1965)[19] envisioned and, therefore, was an inadequate safeguard against prior restraints imposed by City officials acting with unbridled discretion.[20] *Graff*, 9 F.3d at 1331.

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proving, during those proceedings, that the expression was unprotected. *Id.* at 58-59. Furthermore, *Freedman* held that the scheme must assure a prompt final judicial determination. *Id.*

20. However, the concurrence ended up finding that the ordinance did not vest City officials with unbridled discretion. Additionally, this concurrence noted that "the judgments we wisely do not trust to administrative officials without the benefit of a watchful judicial eye are those judgments that are made or are likely to be made in the First Amendment plane." *Graff*, 9 F.3d. at 1333. However, the *Freedman* system of judicial review was not necessary for a "nonthreatening" scheme that only asks and allows administrators to make determinations "for which they are especially suited" including questions about aesthetics and traffic flow. *Id.*

21. There is no "holding" of a majority of Judges comprising the *en banc* panel on this point. Therefore this Court is forced to choose between the plurality opinion joined by five Judges, and the opinions of the five Judges who joined either in the concurrence by Judge Flaum or the dissenting opinion. In the absence of more definitive

In the case at bar, the whole determination of adequacy of judicial review turns upon whether the Park District has too much discretion. If the Park District has too much discretion, then the Ordinance constitutes a prior restraint on free speech, and the common law writ of certiorari would be an inadequate procedural safeguard under the rationales set forth in the concurring opinion by Judge Flaum and in the dissenting opinion.[21] If, on the other hand, it is determined that the Park District does not have too much discretion, then *Graff* would govern[22] and the common law writ of certiorari would be an adequate procedural safeguard.

c. *Conclusion*

In viewing the Ordinance in the light most favorable to Mr. MacDonald, the Park District's discretion is far greater than the City's in *Graff*. Therefore, summary judgment in the Park District's favor is foreclosed at this time.

2. Mr. MacDonald's Motion

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guidance, this Court finds the latter more persuasive.

22. If they do not have too much discretion, then irregardless of how the different opinions in *Graft* line up on the issue of adequate judicial review/procedural safeguards, the instant case would be factually indistinguishable from *Graff*.

As discussed above, the determination as to whether the Ordinance is an unconstitutional prior restraint depends on whether the Park District has too much discretion over the issuance of permits. As discussed in the previous section, there are three primary sources of substantial discretion in the Ordinance: (a) discretion to deny permit applications; (b) discretion as to the fees and expenses imposed on permittees; and (c) discretion as to the time taken to process an application. However, viewing each of these in the light most favorable to the Park District, as non-moving party, the Court finds that a reasonable trier of fact could conclude that the Park District's discretion is substantially more limited than it would appear from an initial facial analysis of the Ordinance.

a. *Discretion to Deny Permit Applications*

Mr. MacDonald's primary challenge is centered on § C(5)(e), which concerns the notice and grounds for denial of a permit.[23] Although the Park District appears to have available, under this subsection, at least four alternative means of exercising discretion, reading the Ordinance in the light most favorable to the Park District, it is possible that more objective criteria have, in practice, developed which would guide the application of these otherwise open-ended bases for denial. Although the discretion available under this provision could render it unconstitutional, it is necessary to review more evidence in order to determine whether the Ordinance is actually

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23. He has also raised other challenges during briefing and hearings. *See MacDonald*, 976 F. Supp. 1125.

applied in a subjective fashion, or whether the Park District uses criteria that makes application of these provisions, in reality, non-subjective.

b. *Discretion as to Permit Fees, Costs, and Other Requirements*

The imposition of fees and costs, under § C(4), appears to create another opportunity for the Park District to exercise discretion. Under § C(4)(b), there is no provision for waiver of the application fee for people who cannot afford to pay it. However, perhaps future evidence will show that, in practice, there is some type of waiver available.

Likewise, § C(4)(c), which requires the applicant to agree to bear "policing" and other clean-up costs raises some concerns. Initially, the Court notes that the term "policing" is unclear and that evidence is needed to determine how "policing" has traditionally been interpreted. The evidence may show that "policing" is more limited or that damages from angry crowds are not, in practice, assessed by the Park District. Thus, in the light most favorable to the non-moving party, the Park district, this Court cannot determine that this provision provides the Park District with too much discretion.

Again, similar to § C(4)(b), there are concerns about the differing categorizations and amounts for the security deposit required by § C(4)(d). Like § C(4)(c), the costs imposed here go, in part, towards "policing" the event. Again, more information is needed concerning the Park District's actual practice and prelitigation interpretation of this section.

The insurance requirement in § C(4)(f) arguably allows the Park District to pass along its discretion to the insurance companies. Also, although the Park District is not required to assist an applicant in obtaining insurance, it sometimes chooses to help. It is unclear, at this time, whether the Park District's practice is to help all applicants, or just select applicants. Thus, the insurance requirement does not, when considered in the light most favorable to the non-moving party, require a grant of summary judgment in favor of Mr. MacDonald.

Finally, § C(6)(c) provides for waiver of the user fee, security deposit, and/or the insurance requirements, if the activity the permit is sought for is "protected by the First Amendment" and would otherwise be too financially burdensome for the applicant to pay. The Ordinance provides no definition of what are "protected" activities. Thus, the discretion available under these provisions could make the Ordinance unconstitutional. However, it is necessary to review evidence of the actual application of this rather vague section in order to determine whether the provisions are actually applied in a subjective fashion, or whether the Park District uses criteria that makes applications of these provisions, in reality, non-subjective.

c. *Discretion as to Time for Processing*

Section C(5)(b) requires that all conditions precedent to the issuance of a permit must be satisfied at least thirty days prior to the event unless a longer time period is prescribed by the General Superintendent. Section C(5)(C) provides the Park District with a period of up to twenty-eight days within which to grant or deny a permit. Here, the sixty-day advance application

requirement for festivals, set forth in the schedule of fees, appears extraordinarily long. Even the thirty-day advance application requirement in the Ordinance is quite long. The procedure for appeal of a denial, § C(6)(a)(2), gives the General Superintendent seven days within which to serve notice of his decision. Thus, the processing deadlines and seven-day appeal provision increases the Park District's ability to exercise discretion over the permitting process. Nonetheless, the Park District's practice of allowing "spontaneous" events might, if consistently applied, vitiate this apparent defect. More evidence on this subject (and what constitutes a "spontaneous" rally) is necessary to such a determination.

d. *Conclusion*

Notwithstanding the fact that this Court found enough discretion under the Ordinance's terms to recommend denial of the Park District's motion for summary judgment as to the facial challenge, Mr. MacDonald's cross-motion should also be denied. The terms of the Ordinance appear to give the Park District a lot of discretion, but how the Park District actually interprets its Ordinance is important. In its final analysis, this Court will give deference to any narrowing construction or practice of the Park District. *See, e.g., City of Lakewood,* 486 U.S. at 770 n.11 (citing *Poulos v. State of New Hampshire,* 345 U.S. 395 (1953); *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975)). The Park District's reasonable construction and implementation of the Ordinance may in fact remedy the apparent defects. For example, the Ordinance contains a provision which appears to allow the Park District to permanently prohibit a prior violator from ever holding another event, yet in

practice, it appears that the Park District allows any previous violation to be cured by paying the fine assessed. Therefore, the Park District's interpretation of the Ordinance could change the Court's view of the amount of discretion it has/is exercising. Thus, viewing the facts in the light most favorable to the Park District, in analyzing Mr. MacDonald's motion for summary judgment, at this time, the Court must view the Park District's discretion as only relating to things comparable to aesthetics and safety, which are permissible under *Graff.*

CONCLUSION

Although the Ordinance, on its face, appears to give the Park District too much discretion, there is a genuine issue of material fact with respect to how the Park District actually applies (and interprets) the Ordinance's provisions. Thus, evidence concerning the past practices of the Park District, with respect to interpreting and applying the Ordinance, is necessary to determine whether the Park District actually exercises as much discretion as the Ordinance would seem to allow. For this reason, the Court recommends that neither of the cross-motions for partial summary judgment be granted.

It is therefore recommended that Plaintiff's Motion for Second Preliminary Injunction be denied. The Court further recommends that each cross-motion for partial summary judgment as to the "facial" challenges be denied. Finally, this Court recommends that Defendant's motion for partial summary judgment, as to the "as applied"

challenge, be granted.

DATED: April 27, 1998 RESPECTFULLY SUBMITTED:

/s/
ARLANDER KEYS
United States Magistrate Judge

Counsel have ten days from the date of service to file objections to this Report and Recommendation with the Honorable George M. Marovich. *See* FED. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1). Failure to object constitutes a waiver of the right to appeal. *Egert v. Connecticut Gen. Life Ins. Co.*, 900 F.2d 1032, 1039 (7th Cir. 1990).

Dated: March 8, 1999

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT MACDONALD,	)	
	)	
Plaintiff,	)	
	)	No. 97 C 2963
v.	)	Judge George M. Marovich
	)	
CHICAGO PARK DISTRICT, a body political and corporate,	)	Magistrate Judge Arlander Keys
	)	
	)	
Defendant.	)	

TO: THE HONORABLE GEORGE M. MAROVICH
UNITED STATES DISTRICT JUDGE

REPORT AND RECOMMENDATION

Before the Court are the parties' cross-motions for summary judgment. For the reasons set forth below, this Court recommends that Plaintiff's motion for summary judgment be granted, in part. The Court also recommends that Defendant's motion for summary judgment be denied.

BACKGROUND[1]

On April 27, 1998, this Court issued a Report and Recommendation advising the District Court to deny both Defendant's and Plaintiff's cross-motions for summary judgment. In its Report and Recommendation, this Court noted that, even though the Ordinance's provisions appeared to give the Park District too much discretion, future evidence might indicate that the Ordinance is actually applied constitutionally in accord with well-established practice. Hence, this Court stated that additional evidence was necessary to determine whether the Ordinance is, in fact, applied constitutionally. (April 27, 1998, Report and Recommendation at 15, 35—40.)

The District Court agreed that more evidence was necessary. Therefore, upon remanding the cross-motions for summary judgment to this Court (for an amended Report and Recommendation), the District Court ordered the parties to provide evidence about whether the Ordinance is applied constitutionally in well-established practice by "supplement(ing) their respective Local Rule 12(M) and (N) statements consistent with Magistrate Judge Keys' R & R." (July 1, 1998, Order.) The

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1. For a more detailed discussion of the underlying facts and procedural history see *MacDonald v. Chicago Park District,* 976 F. Supp. 1125 (N.D. Ill. 1997) (entering preliminary injunction against Park District), *vacated,* 132 F.3d 355 (7th Cir. 1997); and Report and Recommendation of April 27, 1998.

supplemental information provided in response to the District Court's Order will be addressed in the Supplemental Facts section below.

STANDARD FOR SUMMARY JUDGMENT

The parties have filed cross-motions for summary judgment with respect to the constitutionality of the Ordinance, on its face. According to the Federal Rules of Civil Procedure, the moving party is entitled to summary judgment as a matter of law when "there is no genuine issue as to any material fact." FED. R. CIV. P. 56(c).

The initial burden is on the movant to point out "those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986) (citing Fed. R. Civ. P. 56(c)). The non-moving party then has the burden of providing facts that demonstrate a reason for trial. *Rush v. McDonald's Corp.,* 966 F.2d 1104, 1109 (7th Cir. 1992); *see also Waldridge v. American Hoechst Corp.,* 24 F.3d 918, 920 (7th Cir. 1994)(conveying that reliance on mere allegations in the pleadings is not enough to survive summary judgment). Summary judgment should be denied when there is enough evidence for a jury verdict in favor of the non-moving party. *Anderson v. Liberty Lobby,* 477 U.S. 242, 249 (1986); *County of Vernon v. United States,* 933 F.2d 532, 534 (7th Cir. 1991). The Court must view all the facts in the light most favorable to the non-movant when deciding a motion for summary judgment. *Griffin v. Thomas,* 929 F.2d 1210, 1212 (7th Cir. 1991).

SUPPLEMENTAL FACTS

The Park District has virtually exclusive control over the information concerning "the Park District's historical pre-litigation practices and/or interpretations of the Ordinance," which is the information that Judge Marovich ordered to be presented to this Court. (July 1, 1998, Order, quoting April 27, 1998, Report and Recommendation at 15.) Because the Park District generally provided only superficial answers to Plaintiff's interrogatories, Plaintiff had access to few "supplemental" facts. Thus, the following meager facts have been provided by the Park District, and are the only evidence presented concerning historical practices with respect to the Ordinance.

The Park District states that if a permit application is complete, is accompanied by the appropriate fees, and the location is permitted and available, then it looks at the Ordinance's provisions to determine if anything would prevent the application from being granted. (Plaintiff's Supplemental 12(M), Exhibit N, Defendant's Answers to Second Set of Interrogatories at 3.) In addition, the Park District reiterates that the procedure that determines whether to accept an application is generally prescribed in the Ordinance and through "long established practice." (*Id.*) However, the Park District failed to provide any details about that practice; therefore, the Court cannot, even on a motion for summary judgment, credit this statement.

The categorization of an event is initially made by the applicants. (*Id.*) The applicant checks of f a box that indicates the purpose of the permit. (*Id.*) The Park District

accepts the category chosen by the applicant unless there is a "clear reason" why the chosen category is incorrect. (*Id.*)

The Park District states that the decision to waive permit fees, the requirement for insurance, and other costs is usually referred to the legal department, which makes that decision by giving a "broad interpretation of . . . (the] First Amendment." (*Id.* at 4-5; Defendant's Supplemental 12(N) Additional Facts ¶ 2.) The Park District uses the Windy City Hemp Development Board as an example. This group was granted a waiver for the user fee, security deposit, and insurance. (Defendant's Supplemental 12(N), Additional Facts ¶ 3.)[2] The Park District granted Mr. MacDonald a waiver for insurance and user fees for two earlier events. (Defendant's Supplemental 12(N), Additional Facts ¶ 3; Defendant's Supplemental 12(N), Supplemental Affidavit of Joan Fencik ¶ 4.)

A Park District employee or independent contractor is assigned to monitor permitted events, and that individual checks the permitted area before, during, and after the event. (Defendant's Supplemental 12(M), Affidavit of Joan Fencik ¶ 11.) This monitor makes notes of damages and permit violations and may also take

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2. Although the Park District does not actually provide a citation for this factual statement in its 12(N), the Court notes that it comes from the Supplemental Affidavit of Joan Fencik, which was attached to Defendant's Supplemental 12(N).

photographs. (*Id.*) The security deposit is withheld if the monitor believes that the permittee proximately caused the damage or undertook activities that were outside the scope of the permit. (*Id.* ¶ 13.)

The Park District has different deadlines for submitting applications for events because some events are more complex than others. (Plaintiff's Supplemental 12(M), Exhibit N, Defendant's Answers to Second Set of Interrogatories at 5.) In addition, the Park District only denies an application for lateness if there is not enough time to conduct all of its responsibilities. (*Id.*) The Park District has "never" used the 14-day extension in C(5)(B) to extend the date of deciding whether to grant a permit application beyond the date of a proposed event, nor has the Park District ever received a complaint on this matter. (Defendant's Supplemental 12(M), Affidavit of Joan Fencik ¶¶ 9,10.)

In 1998, the Park District issued special event permits to 21 groups who had forfeited their security deposits during the previous year. (Defendant's Supplemental 12(N), Ex. A.) However, all of these groups' events appear to be corporate and/or athletic. Furthermore, there is no evidence as to how many permits were denied to individuals or groups who previously forfeited security deposits.

DISCUSSION

Certain provisions of the Ordinance are unconstitutional because they lack neutral criteria limiting the Park District's discretion, or penalize unpopular speech. Additionally, the three cases cited by the Park

District in its Supplemental Memorandum are inapposite, as discussed below.

A. Sections Invalid Because They Lack Neutral Criteria

Because the Ordinance is clearly a prior restraint,[3] *Stokes v. City of Madison*, 930 F.2d 1163, 1168 (7th Cir. 1991), "the Constitution requires that the [Park District] establish neutral criteria to insure that the licensing decision is not based on the content or viewpoint of the speech being considered." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 760 (1988). The Constitution requires neutral criteria because a regulation that may be arbitrarily applied has the potential to improperly suppress disfavored speech or disliked speakers. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 131 (1992); *see also Lakewood v. Plain Dealer*, 486 U.S. at 750 (holding invalid an ordinance that allowed the city to deny a permit – to place newsracks on public property – for any reason, and did not impose a time limit on the decision to grant or deny a permit). Further, the neutral criteria that limits an ordinance must be "made explicit by textual incorporation,

3. Under section C (5) (e), the Park District may deny use of traditional public fora in advance of actual expression or assembly.

binding judicial or administrative construction, or well-established practice." *Lakewood v. Plain Dealer*, 486 U.S. at 770.

As discussed below, a considerable amount of the Ordinance's text requires the Park District to exercise its discretion, unbridled by neutral criteria, in deciding whether to issue a permit. Since the text leaves much room for discretion, and there are no judicial or administrative constructions, the validity of the Ordinance must stand or fall on the existence of well-established practice. This Court, in its Report and Recommendation, and the District Court, in its Order, determined that more evidence was necessary to determine whether, despite plain language to the contrary, the Ordinance has actually been historically applied constitutionally. This Court was willing to hold an evidentiary hearing, but both parties expressed the belief that an evidentiary hearing would not be helpful to the Court. (September 30, 1998, Tr. of Proceedings at 4.)

Thus, despite Judge Marovich's Order for the submission of additional evidence, and despite claiming that a hearing was unnecessary, the Park District basically has provided no new evidence to demonstrate a "well-established practice" narrowing construction of the Ordinance. In addition, Defendant's answers to Mr. MacDonald's interrogatories did not provide him with the information he requested, and barely mentioned any historical practices of the Park District. Finally, the Park District's own 12(M) (and Affidavits of Joan Fencik) failed to show evidence that demonstrates a historical practice in its interpretation of the Ordinance, and instead merely parroted the language of the Ordinance or the words

"established practice", without providing any context. Therefore, this Court must conclude that there is no well—established practice limiting application of the Ordinance.[4]

1. Section C(5)(e)

Throughout the history of this case, Plaintiff's primary focus has been on section C(5)(e), which concerns the grounds for denial of a permit, and reads as follows:

> To the extent permitted by law, the Park District may deny an application for permit if the applicant or the person on whose behalf the application for permit was made has on prior occasions made material misrepresentations regarding the nature

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4. The Court bases its conclusion on the dearth of evidence, as well as the numerous opportunities given to the Park District to provide this critical information. In addition (and alternatively, in the event that such evidence does exists, but was not presented to Mr. MacDonald or the Court) this Court finds that sanctions are warranted against the Park District for its refusal to fully cooperate in discovery, and, more importantly, for its refusal to produce the evidence (to the Plaintiff and to this Court) as ordered by Judge Marovich on July 1, 1998. FED. R. CIV. P. 37(d); 37(b)(2)(A). T he Court further finds that a just sanction for the Park District's disobedience is to deem, as admitted, the fact that there is no well-established practice limiting application of the Ordinance.

or scope of an event or activity previously permitted or has violated the terms of prior permits issued to or on behalf of the applicant. The Park District may also deny an application for permit on any of the following grounds:

(1) the application for permit . . . is not fully completed and executed;

(3) the application for permit contains a material falsehood or misrepresentation; . . .

(5) the applicant or the person on whose behalf the application for permit was made has on prior occasions damaged Park District property and has not paid in full for such damage, or has other outstanding and unpaid debts to the Park District; . . . [or]

(11) the use or activity intended by the applicant is prohibited by . . . the regulations of the General Superintendent . .

(emphasis added).

As discussed in this Court's prior Report and Recommendation, the plain language of this subsection fails to provide any neutral criteria to guide the Park District's: determination of what conduct constitutes a material misrepresentation, a violation of a prior permit, a material falsehood on an application, or damage to Park District property on a prior occasion (collectively referred to herein as "alleged misconduct"); decision as to who was responsible for the alleged misconduct; and decision as to which applications (where misconduct has

been found) should be permitted anyway.[5]

Similarly, there are no neutral criteria in the Ordinance for what type of evidence is required to prove alleged misconduct, or even an indication that any proof is necessary. Further, it is not clear who at the Park District is designated to make these determinations – it appears that any Park District employee could make a notation in a file that a prior permittee violated some provision of the Ordinance. Most troubling, however, is the omission of any limit regarding how long an instance of alleged misconduct can cause an individual to be barred from obtaining a permit. The Ordinance provides no maximum penalty. Thus, it appears that the Park District could choose to exercise its discretion to prevent someone from ever getting a permit again. This subjective determination could be even more invidious due to the fact that permit seekers whose audiences have caused prior permit violations (resulting in alleged misconduct vis a vis the permittee) are likely those whose speech generates the most public outcry.

The Park District did provide a list of groups that forfeited security deposits in 1997, but still received permits in 1998. However, none of these groups cited by the Park District appear to have had unpopular or controversial speakers – a strong indication that the Park District is exercising its discretion to deny permits due to prior misconduct only where the speaker is controversial. Most of the groups the Park District listed seem to involve corporate or athletic events[6] (which

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5. The subparts regarding a "complete" permit and specifying denial for activities prohibited by regulations of the General Superintendent also are subject to discretion.

5. "March of Dimes", "Bark in the Park", "Y Me Race Against Breast Cancer", "Cancer Survivors Walk", "Orbis

(continued...)

would only involve incidental free speech, if any). Hence, this is not evidence of a well-established practice that alleviates the Court's concerns. Based on the foregoing, even in a light most favorable to the Park District, the discretion available under this section of the Ordinance renders it unconstitutional, on its face.

2. Section C(6)(c)

Section C(6)(c) provides for waiver of certain fees, but such waiver is totally discretionary:

> Any requirement for a user fee, security deposit, or certificate of insurance shall be waived by the General Counsel, if the activity is protected by the First Amendment of the United States Constitution and the requirement would be so financially burdensome that it would preclude the applicant from using Park District property for the proposed activity . . . .

(emphasis added).

(...continued)

Broadcast Group", "Burnham Consultants/Mike Gaynor", "A.V.P.", "Timothy O'Tooles", "Embassy Suites Hotel", "Twin Cities Chicago Aids Ride", "Jack Brazier/2626 Condo Assoc.", "Park Community Church", "Friends of Park/LATE Ride", "G.E. Capitol Corp.", "Tripp Mfg. Company", "Bulls 3 on 3", "Capri Events/Kids's Triathlon", "Capri Events/Mrs. T's Triathlon", "United Negro College Fund", "AIDS Walk Chicago", and "LaSalle Banks Chicago Marathon". (Defendant's Supplemental 12(N), Ex. A.)

As discussed in this Court's previous Report and Recommendation, if the Park District's General Counsel, Ms. Fencik, determines that an activity is "protected" by the First Amendment and that the user fee, security deposit, or certificate of insurance is financially overly burdensome, then those requirements are waived. There is no definition of what are "protected" activities. Presumably, all speech and assembly are protected by the First Amendment, but such a reading of the Ordinance would render the "protected by the First Amendment" language superfluous.

The Park District says that it broadly interprets the language regarding First Amendment activities; however, it notes one grant of (full) waiver -- to the Windy City Hemp Development Board – and reiterates that it previously, on two occasions, granted Mr. MacDonald a waiver for the insurance and the user fees. These are, given the Park District's response to Mr. MacDonald's interrogatories, presumably the only instances in which it granted waivers. The evidence of three isolated waivers is not enough to indicate a well-established practice that would limit the Park District's discretion, even viewed in a light most favorable to the Park District. Because the Park District did not provide the information needed to establish that application of the Ordinance is limited, the Court must look only to the actual language of the Ordinance. As this Court discussed in its April 27, 1998 Report and Recommendation, this provision gives the Park District too much discretion. Therefore, this section of the Ordinance is unconstitutional on its face.

B. Sections Invalid Because They Penalize Unpopular Speech

"Freedom of speech . . . [is] available to all, not merely to those who can pay their own way." *Murdoch v. Pennsylvania*, 319 U.S. 105, 111 (1943). "A state may not impose a charge for the enjoyment of a right granted by the federal constitution." *Id.* at 113. The cost of

maintaining order cannot be passed along to those wishing to demonstrate in a public forum as a pre-condition of the granting of a permit. *Forsyth*, 505 U.S. at 134-35.

1. Section C(4) (c)

Section C(4)(c) states that no permit shall be granted unless the applicant has:

> executed an agreement with the Park District (promising] to bear all costs of policing, cleaning up and restoring the park upon conclusion of the event or activity; to reimburse the Park District for any such costs incurred . . . and to indemnify the Park District and hold the Park District harmless from any liability to any person resulting from any damage or injury occurring in connection with the permitted event proximately caused by the action of the permittee, the sponsoring organizer, its Officers, Employees or agents or any person under their control insofar as permitted by law.

(emphasis added).

This provision conditions the issuance of a permit on the ability of the applicant to pay for injuries and damage resulting from speech and assembly. The indemnification and reimbursement expenses depend upon the crowd's reaction to the speech and assembly. Thus, by requiring the permit applicant to personally bear the cost of his/her public rally, the conveyance of unpopular messages could be chilled. This provision could dissuade speakers from using public parks for political speeches because of a fear of huge financial consequences. This regulation could be used to punish a speaker for attracting too many followers; for example, a large crowd might result in a speaker being held

responsible for trampling of grass and could result in charges for resodding the park. By contrast, an unpopular speaker night be assessed the costs of cleaning up broken bottles thrown at him/her by the angry crowd. Moreover, the Ordinance also requires the applicant to guarantee in advance that, if the crowd is hostile to the message and resultingly requires a large security contingent, he/she will pay for that "policing". That requirement directly contravenes Forsyth's holding that the cost of maintaining order cannot be passed on to those wishing to demonstrate in a public forum as a pre-condition of the granting-of a permit. Thus, this section of the Ordinance is facially unconstitutional.

2. Section C(4)(d)

Section C(4)(d), concerns security deposits and states:

> no application for permit shall be granted unless the applicant has paid . . . the security deposit in an amount in accordance with the schedule of fees . . . The amount of the security deposit set in the schedule of fees shall be equal to the estimated cost of policing, cleaning up, and restoring the park upon the conclusion of the use or activity. . . Promptly after the conclusion of a permit activity, the Park District shall inspect the premises and equipment used by the permittee . . . .
>
> (2) If it is determined by such inspection, that the permitted event proximately caused damage . . . or . . . that fines should be assessed . . . the Park District shall retain the security deposit or any portion, thereof, necessary to pay for the cost of repair or any fines assessed against the permittee . . . .

Like § C(4)(C), the costs imposed here go, in

part, towards "policing" the event. However, this section chiefly deals with security deposits, and requires that the security deposit be equal to the estimated cost of policing and cleaning up after the conclusion of an activity. In its previous Report and Recommendation, the Court expressed concerns that this section would deter a person from delivering a speech that incited bottle throwers because the person would have to pay more for the permit. The Park District states that it only holds the speaker accountable for damages that are "proximately" caused by the speaker. (Defendant's Supplemental 12(M), Affidavit of Joan Fencik ¶ 13.) But there is no evidence regarding the standard or procedures the Park District uses in calculating what damages are proximately caused by the speaker, and what damages are not.[7]

Additionally, the Park District cannot, and does not, determine whether the debris or graffiti being cleaned up at the site of the event is from the speaker or from an unruly crowd not under the perinittee's control. The Park District's schedule of fees provides that security deposits are tripled for organizations that have forfeited their security deposits at prior events. This punitive trebling of the security deposit is another penalty imposed for the crowd's negative reaction to the speaker's message. As the Supreme Court explained in *Forsyth*, a regulation was invalid because '(t]hose wishing to express views unpopular with bottle throwers, f or example, may have to pay more for their permit." *Forsyth*, 505 U.S. at 134. "Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." *Id.* at 134-35. Nor can an applicant's future

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7. This also raises similar issues of unfettered discretion and lack of evidence of narrowing through well-established practice, as were addressed in Part A of this Report and Recommendation.

speech be barred outright because prior speech has offended such a mob. Thus, this provision of the Ordinance is facially unconstitutional.

3. Section C(4)(f)

Section C(4) (f) imposes a hefty insurance requirement on applicants:

> Applicant shall procure and maintain at all times during its use of Park District property, insurance in such amounts and with such coverages as shall reasonably be required by the Park District . . . . The Division of Risk Management shall prepare a uniform schedule of insurance guidelines for particular types of activities. Applicant shall provide Park District with a certificate from an insurer evidencing such coverage prior to applicant's use of Park District Property . . . .

There is no provision for waiver if the applicant is unable to obtain insurance because no company will provide it. This section allows the Park District to pass along its discretion to the insurance companies – the insurance providers decide whether an event is too risky to insure, and may (likely will) make their determination based on the message or content of the event. Those with unpopular views (especially those likely to receive a negative response from the public) will have a difficult, if not impossible time getting insurance, or it will cost them much more. See *Collin v. Smith*, 447 F. Supp. 676, 684 (N.D. Ill. 1978) (insurance was beyond the reach of Nazi organization because "insurance companies are simply not interested in writing the kind of policy required due to the unknown risks involved . . . ."), aff'd, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978); *see also Pritchard v. Mackie*, 811 F. Supp. 665, 668 (S.D. Fla. 1993) (insurance requirement "fails to take into account

the possibility that the most heinous political groups in American society may find it difficult, if not impossible to actually purchase insurance."). The Park District is not required to assist an applicant in obtaining insurance, but it sometimes chooses to help[8] - itself an indication that insurance can be difficult to obtain. Thus, this provision of the Ordinance is facially unconstitutional.

C. Park District's Cases

The Park District does not again raise discussion of *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993)(en banc), in its Supplemental Memorandum. Therefore, this Court simply incorporates its previous exhaustive analysis of *Graff*'s inapplicability to the instant case from the April 27, 1998 Report and Recommendation. The Park District does cite three new cases to support its argument that the Ordinance is constitutional; however, none of these cases are controlling. In addition, all of these cases are distinguishable from the present situation.

MacDonald v. City of Chicago, 97 C 5266, 1998 U.S. Dist. LEXIS 15361, at *3 (N.D. Ill. September 23, 1998) and *MacDonald v. Safir*, No. 98 Civ. 2332, 1998 U.S. Dist. LEXIS, at *2 (S.D. N.Y. June 16, 1998) both involved parade ordinances (and denial of parade permits for major public streets). The present case, however, does not involve a permit scheme for a parade. Instead, the Ordinance here covers the use of parks for a variety of activities, including pure speech. As the

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8. Again, this raises issues of unfettered discretion and lack of evidence of narrowing through well-established practice, similar to those addressed in Part A of this Report and Recommendation.

Supreme Court has held, the First Amendment does not give the same protection to conduct such as marching and patrolling as it does to expressing oneself through pure speech. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969). Therefore, the present Ordinance is more closely examined than a parade ordinance.

The Park District also cites *Gasparo v. City of New York*, No. 98 CV 3168, 1998 U.S. Dist. LEXIS 12300, at *30—31 (E.D. N.Y. May 26, 1998) and notes that the district court found the discretion of New York City in licensing newsstands to be similar to that of Chicago in *Graff*. (Park District's Supplemental Memorandum at 7.) The Park District argues that *Gasparo*'s finding of similarity to *Graff* supports a finding that the Ordinance here is facially constitutional. However, that argument is unavailing. This Court has already exhaustively distinguished the city's discretion in *Graff* from the Park District's discretion in the instant case. (April 27, 1998, Report and Recommendation at 16—32.) In short, the discretion afforded by the scheme in *Graff* was much less than the unbridled discretion afforded by the Ordinance here. *Gasparo*'s finding of similarity to *Graff* does not now make *Graff* any more applicable to this case than it was before. In fact, because the ordinance in *Gasparo* was found to give discretion similar to that of the city in *Graff*, *Gasparo*, too, is distinguishable from the present case.

CONCLUSION

The Court has carefully reviewed all the facts presented, and recommends that the Defendant's motion for summary judgment be denied. Further, the Court recommends, that Plaintiff's motion for summary judgment be granted, in part, with respect to sections C(5)(e), C(6)(c), C(4)(c), C(4)(d), and C(4)(f) of the Ordinance.

DATED: March 8, 1999

RESPECTFULLY SUBMITTED:

/s/

ARLANDER KEYS
United States Magistrate Judge

Counsel have ten days from the date of service to file objections to this Report and Recommendation with the Honorable George M. Marovich. *See* FED. R. CIV. P.72(b); 28 U.S.C. S 636(b)(l). Failure to object constitutes a waiver of the right to appeal. *Egert v. Connecticut Gen. Life Ins. Co.*, 900 F.2d 1032, 1039 (7th Cir. 1990).

Dated: March 29, 1999

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT MACDONALD, Plaintiff,	)	
v.	)	No. 97 C 2963
CHICAGO PARK DISTRICT, Defendant.	)	Judge George M. Marovich

MEMORANDUM OPINION AND ORDER

Defendant Chicago Park District (the "Park District") has filed written objections to Magistrate Judge Keys' Report and Recommendation ("R & R") entered on March 3, 1999. Magistrate Judge Keys' R & R considered cross-motions for summary judgment filed by Plaintiff, Robert MacDonald ("MacDonald"), and the Park District concerning a facial challenge to the constitutionality of the Park District's Permit Ordinance (the "Ordinance"). In his R & R, Magistrate Judge Keys recommended that MacDonald's motion for summary judgment be granted in part and that the Park District's motion for summary judgment be denied. For the reasons set forth below, this Court sustains the Park District's objections to Magistrate Judge Keys' R & R, denies MacDonald's motion for summary judgment and grants the Park District's motion for summary judgment.

BACKGROUND

Because this is the sixth time that a court in this district has considered this case, the Court will rely heavily on the factual background described in earlier opinions. For a more detailed discussion of the underlying facts and procedural history, *see MacDonald v. Chicago Park Dist.*, 976 F. Supp. 1125 (N.D. Ill. 1997), *vacated*, 132 F.3d 355 (7th Cir. 1997); Report and Recommendation of April 27, 1998; July 1, 1998 Order; Report and Recommendation of March 8, 1999.

MacDonald and the Park District are once again before this Court as part and parcel to their ongoing dispute concerning the constitutionality of the Park District's permit procedure.[1] At this stage in the proceedings, MacDonald makes a facial challenge to the constitutionality of the Park District Code. MacDonald's interest in doing so relates – at least in part – to his professed desire to hold future rallies in Grant Park (particularly in Butler Field adjacent to the Petrillo Bandshell) in order to advocate drug policy reform,

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1. The Park District's permit requirement applies to, among other things, any public assembly or other event that involves more than fifty persons, that uses amplified sound, that includes a musical performance, or that involves the erection of any tent, stage, or other structure on Park District property. *See* Park District Code § C(3)(a).

including the legalization of marijuana.[2]

MacDonald's proposed rallies would include, *inter alia*, approximately 10,000 attendees per day, live music, vendors, tents, and amplified sound. MacDonald staged two such rallies in August 1996, after obtaining permits from the Park District.[3] Yet, when he applied for a further permit to hold a similar rally in May of the following year, the Park District denied his application, citing various violations of the two earlier permits. The Park District Code authorizes the denial of a permit if the applicant "has violated the terms of prior permits issued to or on behalf of the applicant." Park District Code § C(5)(e). Although the Park District denied MacDonald's permit application, and his request for a preliminary injunction addressed to that denial was refused, the Park District permitted MacDonald to hold his rally on May 10-11,

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2. Grant Park, like other parks within the City of Chicago, is exclusively under the Park District's control. Grant Park is a traditional public forum.

3. The Park District's permit requirement applies to, among other things, any public assembly or other event that involves more than fifty persons, that uses amplified sound, that includes a musical performance, or that involves the erection of any tent, stage, or other structure on Park District property. *See* Park District Code § C(3)(a).

1997.[4] The Park District also assisted MacDonald by opening bathrooms, providing garbage cans, and allowing MacDonald to use portable speakers to amplify sound.

Nevertheless, fearing that the Park District would continue to deny permit applications to him based on his earlier violations, MacDonald advanced a facial challenge to the Park District's permit procedure, arguing that portions of the Park District Code are facially invalid because they violate the First Amendment.

MacDonald's challenge to the Park District's permit procedure is primarily directed against section C(5)(e) of the Park District Code, which governs the grounds for denial of a permit application. That section provides:

> Notice of denial of an application for permit shall clearly set forth the grounds upon which the permit was denied and, where feasible, shall contain a proposal by the Park District for measures by which the applicant may cure any defects in the application for permit or otherwise procure a permit. Where an application for permit has been denied because a fully executed prior application for the same time and place has been received, and a permit has been or will be granted to the prior applicant authorizing uses or activities which do not reasonably permit multiple occupancy of the particular area, the Park District

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4. Consistent with Park District "practice," MacDonald was allowed by the Park District to hold "'spontaneous' First Amendment rallies and demonstrations." *MacDonald*, 132 F.3d at 358.

> shall propose an alternative place, if available, for the same time, or an alternative time, if available, for the same place.
>
> To the extent permitted by law, the Park District may deny an application for permit if the applicant or the person on whose behalf the application for permit was made has on prior occasions made material misrepresentations regarding the nature or scope of an event or activity previously permitted or has violated the terms of prior permits issued to or on behalf of the applicant. The Park District may also deny an application for permit on any of the following grounds:
>
> (1) the application for permit, including any required attachments and submissions, is not fully completed and executed;
>
> (2) the applicant has not tendered the required application fee with the application or has not tendered the required user fee, indemnification agreement, insurance certificate, or security deposit within the times prescribed by the General Superintendent;
>
> (3) the application for permit contains a material falsehood or misrepresentation;
>
> (4) the applicant is legally incompetent to contract or to sue and be sued;
>
> (5) the applicant or the person on whose behalf the application for permit was made has on prior

occasions damaged Park District property and has not paid in full for such damage, or has other outstanding and unpaid debts to the Park District;

(6) a fully executed prior application for permit for the same time and place has been received, and a permit has been or will be granted to a prior applicant authorizing uses or activities which do not reasonably permit multiple occupancy of the particular park or part thereof;

(7) the use or activity intended by the applicant would conflict with previously planned programs organized and conducted by the Park District and previously scheduled for the same time and place;

(8) the proposed use or activity is prohibited by or inconsistent with the classifications and uses of the park or part thereof designated pursuant to this chapter, Section C.1., above;

(9) the use or activity intended by the applicant would present an unreasonable danger to the health or safety of the applicant, or other users of the park, of Park District Employees or of the public;

(10) the applicant has not complied or cannot comply with applicable licensure requirements, ordinances or regulations of the Park District concerning the sale or offering for sale of any goods or services;

(11) the use or activity intended by the applicant is prohibited by law, by this Code and ordinances of the

Park District, or by the regulations of the General Superintendent.

Park District Code § C(5)(e). MacDonald has also challenged certain fee and insurance provisions in the Park District Code as being facially invalid. *See* Park District Code §§ C(6)(c), C(4)(c), C(4)(d) and C(4) (f)

Pursuant to this Court's referral order, on April 27, 1998, Magistrate Judge Keys issued a R & R advising the Court to deny both the Park District's and MacDonald's cross-motions for summary judgment. In his R & R, Magistrate Judge Keys noted that, even though the Ordinance's provisions appeared to give the Park District too much discretion – in violation of the First Amendment – future evidence might indicate that the Ordinance is actually applied constitutionally in accord with well-established practice. Accordingly, Magistrate Judge Keys stated that additional evidence was necessary to determine whether the Ordinance is, in fact, applied constitutionally by the Park District. (April 27, 1998, Report and Recommendation at 15, 35-40.)

This Court agreed with Magistrate Judge Keys that more evidence was necessary in order to complete the record. Therefore, upon remanding the cross-motions for summary judgment to Magistrate Judge Keys (for an amended R & R), this Court ordered the parties to provide evidence about whether the Ordinance is applied constitutionally in well-established practice by "supplement[ing] their respective Local Rule 12(M) and (N) statements consistent with Magistrates Judge Keys' R & R." (July 1, 1998, Order.)

On March 3, 1999, Magistrate Judge Keys issued an amended R & R advising this Court to deny the Park District's motion for summary judgment and grant, in part, MacDonald's motion for summary judgment. Specifically, Magistrate Judge Keys found that sections C(5) (e), C(6) (c), C(4) (c), C(4) (d), and C(4) (f) of the Park District Code were unconstitutional because, *inter alia*, they provided too much discretion to Park District officials and presented an unacceptable risk that protected speech could be chilled or suppressed.

DISCUSSION

I. Standard of Review

Section 636(b) (1) (B) of Title 28 authorizes a district court to refer a matter to a magistrate judge to conduct an evidentiary hearing. Following this hearing, the magistrate judge cannot enter a final judgment, but must submit to the district court proposed findings of fact and recommendations for disposition, to which either party may file written objections within 10 days. 28 U.S.C. § 636(b) (1) (B); Fed. R. Civ. p. 72(b). The district court is required to conduct a *de novo* review of those portions of the magistrate judge's report and recommendations to which specific written objections have been filed. This *de novo* review is not the same as a *de novo* hearing, however. The district court is not required to conduct another hearing to review the magistrate judge's findings and credibility determinations. *United States v. Raddatz*, 447 U.S. 667, 675 (1980); *Goffman v. Gross*, 59 F.3d 668, 671 (7th Cir. 1995); *United States v. Severson*, 49 F.3d 268, 273 (7th Cir. 1995). Rather, the district court has discretion to "accept, reject, modify, in whole or in part, the findings or

recommendations made by the magistrate." 28 U.S.C. § 636(b) (1); Fed. R. Civ. P. 72(b). If the district court finds a problem, it may take additional evidence, call witnesses, or remand to the magistrate judge for further development. *Raddatz*, 447 U.S. at 675. But if following a review of the record the district court is satisfied with the magistrate judge's findings and recommendations, it may in its discretion treat those findings as its own. *Id.* at 676.

II. Section C(5)(e)

At this point in the proceedings, it would be an understatement to note that this Court is not writing on a clean slate. The applicable constitutional standards have been addressed, *ad nauseam*, by Magistrate Judge Keys, this Court and the Seventh Circuit. Everyone appears to be in agreement that section C(5)(e) is "content-neutral" and, therefore, the critical determination is whether section C(5)(e) entrusts the Park District with "virtually unlimited discretion" in awarding or denying permits. *See MacDonald*, 132 F.3d at 361.

In *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988), the Supreme Court considered a city ordinance giving the mayor authority to grant or deny applications for annual permits to place newsracks on public property. The Court explained that when a licensing statute allegedly vests "unbridled discretion" in a government official over whether to permit or deny expressive activity, it poses significant "First Amendment risks" of undetectable content-based censorship as well

as self-censorship on the part of the speaker to avoid being denied a license to speak. *Id.* at 757-58. The Court cautioned that these dangers are "at [their] zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." *Id.* at 763.

Recognizing the dangers inherent in licensing schemes affording unbridled discretion, the Seventh Circuit – while considering MacDonald's motion for a preliminary injunction – directed the parties in this case to its en banc decision in *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993) (en banc). *MacDonald*, 132 F.3d at 361. After giving a brief summary of its opinion in *Graff*, the Seventh Circuit opined that the *Graff* holding "poses a substantial obstacle to MacDonald's ability to establish that section C(5)(e) is facially invalid." at 362 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989); *United States v. Kistner*, 68 F.3d 218, 221 (8th Cir. 1995)). Although the Seventh Circuit "emphasized" that its "decision [was] not one on the merits of any of MacDonald's claims," the court was clearly of the opinion that, absent new record evidence from MacDonald to the contrary, section C(5)(e) is constitutional under its decision in *Graff*. *See MacDonald*, 132 F.3d at 363.

Taking the Seventh Circuit at its word, this Court has conducted its own review of section C(5)(e) in light of *Graff* and other authority on the question of what constitutes "unbridled discretion." This Court finds that section C(5)(e) contains ample specific and objective criteria for evaluating permit applications; thus, effectively avoiding the "unbridled discretion" problem

identified by the Supreme Court in *Lakewood*. Moreover, after reviewing the ordinance at issue in *Graff*, the Court believes that the permit criteria outlined in section C(5)(e) are at least as specific as those contained in the *Graff* ordinance.

For example, in *Graff*, the city commissioner could consider, *inter alia*, whether "the design, materials and color scheme of the newspaper stand comport with and enhance the quality and character of the streetscape" or whether the placement of the newsstand "endangers public safety or property." These criteria appear to be far more subjective than many of the Park District's permit criteria complained of by MacDonald, such as whether applicants have made "material misrepresentations" in their permit applications in the past or whether they have "violated the terms of prior permits." *See* Park District Code § C(5)(e). While the Court appreciates that section C(5)(e) contains some ambiguities and places a certain modicum of discretion with Park District officials, "[njot all discretionary decisions implicate the First Amendment." *Graff*, 9 F.3d at 1319 (citing *City of Cincinnati v. Discovery Network. Inc.*, 507 U.S. 410, 430 (1993)).

The most important question that this Court must answer is whether the limited discretion given to the Park District under section C(5)(e) poses a "real or substantial threat" of censorship. *See Ward*, 491 U.S. at 794-95. After considering the text of section C(5)(e) and the limited record evidence available concerning its "historical pre-litigation practices and/or

interpretations,"[5] this Court concludes that the ordinance does not chill or suppress the speech *content* of permit applicants in violation of the First Amendment.[6]

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5. Magistrate Judge Keys complained about the "dearth of evidence" on this point despite the "numerous opportunities given to the Park District to provide this critical information." March 8, 1999, Report and Recommendation at 8 n.4 This Court must echo Magistrate Judge Keys' frustrations with the Park District on this point. From what this Court can glean, the Park District has gone out of its way to ignore several of the orders of this Court and Magistrate Judge Keys. See March 8, 1999, Report and Recommendation at 8 n.4 (finding sanctions warranted for Park District's refusal to cooperate in discovery); July 1, 1998, Order (Court is distressed that the parties have chosen to ignore Magistrate Judge's request for "crucial proof"). Moreover, this is not the only case in which the Park District has gone out of its way to frustrate the Court and obstruct the litigation process. See *Ayres v. City of Chicago*, 97 C 2176, 1998 WL 102791, at *2, *4 (N.D. Ill. Feb. 19, 1999) (Court "deeply troubled" by Park District taking it down "dead-end procedural path"). It should be noted that the present outcome is in spite of, not because of, the Park District's vexatious course of conduct before the Magistrate Judge and this Court.

6. In so far as this Court finds that the permit procedure does not constitute an unconstitutional prior restraint, then the procedural safeguard requirements are satisfied by the common-law writ of certiorari, as explained in *Graff*. *See Graff*, 9 F.3d at 1325, 1331 (seven judges

III. Fee and Insurance Provisions

MacDonald also contends that the Park District is given virtually unbridled discretion in determining the fees for a particular event. Specifically, MacDonald argues that the Park District is given the discretion to vary its fee structure based on the content of an applicant's speech, thereby forcing applicants to bear the cost of maintaining order should their speech be unpopular or "wildly" popular. For example, forcing an unpopular speaker to pay extra for the anticipated cleanup costs of the proverbial bottle throwers.

In *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992), the Supreme Court explained that "[listeners' reaction to speech is not a content-neutral basis for regulation." *Id.* at 134. To this end, governmental bodies may not assess fees which will depend on a "measure of the amount of hostility likely to be created by the speech based on its content." *Id.* That having been stated, the Supreme Court has also recognized that "(t]here is nothing contrary to the Constitution in the charge of a fee" for the maintenance of public order, so long as it does not amount to a surcharge or a "premium" in the case of a controversial political message delivered before a hostile audience. *Id.* at 136 (quoting *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941)). The fundamental question that this Court must address is whether the Park District's permit fee

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concluded that for content-neutral licensing scheme, the common law writ of certiorari provides adequate judicial review).

structure is – or poses a "real or substantial threat" of becoming – "content-based."

Both parties agree that the applicable permit fees are set based on a content-neutral schedule according to the type of event and the number of people expected (i.e., weddings and picnics pay a $10 application fee, a user fee of $50 per 250 attendees, a security deposit of $100 per 250 attendees, and are required to have a $100 million certificate of insurance).

Moreover, the applicant, rather than the Park District, designates the relevant classification and applies for a particular type of permit. Thus, on its face, the fee structure in question appears to give the Park District little, if any, discretion to make the type of content-based determinations that MacDonald and the Court in *Forsyth* are concerned about. Furthermore, MacDonald has presented no evidence to suggest that the fee structure has been applied by the Park District in a discriminatory manner or in such a way so as to vary the fee based upon the content of the speech at issue.

MacDonald also challenges the Park District's waiver provision that allows applicants to request a waiver of the user fee, security deposit, and insurance requirements "if the activity [proposed by the applicant] is protected by the First Amendment of the United States Constitution and the requirement would be so financially burdensome that it would preclude the applicant from using Park District property for the proposed activity." Park District Code § C(6)(c). Under those circumstances, the fee requirements "shall be waived." *Id.*

After reviewing the text of the Park District's waiver provision, the Seventh Circuit opined that, "[a]bsent evidence that this waiver provision has been applied by the Park District in a discriminatory manner, we doubt that it vests too much discretion in local officials under Forsyth." *MacDonald*, 132 F.3d at 363. This Court agrees. Moreover, the limited evidence presented to the Court regarding how this waiver provision has been applied does not support a finding of content-based discrimination.[7] To the contrary, MacDonald and his organization have been granted partial waivers on at least two occasions by the Park District. Thus, while the Court acknowledges that the designation of which activities are "protected by the First Amendment" vests a certain amount of discretion to Park District officials, the waiver provision, on balance, appears to be designed to encourage and protect speech rather than chill or suppress it. Accordingly, the Court finds that the waiver provision in question withstands MacDonald's facial challenge.

CONCLUSION

For the reasons stated above, the Park District's motion for summary judgment is granted and MacDonald's motion for summary judgment is denied.

ENTER:

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7. MacDonald has failed to offer any evidence suggesting that the waiver provision has been applied in a discriminatory manner.

/s/

GEORGE M. MAROVICH
UNITED STATES DISTRICT JUDGE

[The following are those provisions of the Chicago Park District Code of ordinance that are pertinent to the issues presented in this Petition.]

CHAPTER VII. USE OF PARKS.

SECTION A. DEFINITIONS.

For purposes of this chapter, the following words, terms, phrases and their derivatives shall have the meanings set forth in this section . . .

> "Amplified Sound" means any sound projected or transmitted by artificial means, Including, but not limited to, loudspeakers, amplifiers, powered megaphones or any similar devices.

* * *

SECTION C. PERMITS

3. Permit Requirement.

a. General.

No person shall, without a permit:

(1) conduct a public assembly, parade, picnic, or other event involving more than fifty individuals;

* * *

(3) conduct any exhibit, music or dramatic performance, fair, circus, concert, play, radio or television

broadcast, other than a news transmission;

(6) create or emit any Amplified Sound . . .

(7) station or erect any building, tent, canopy, stand, bandstand, stage, tower, scaffold, sound stage, platform, rostrum or other structure;

(8) station or use any electrical or electronic device or equipment that would require outdoor auxiliary power;

(9) sell or offer for sale any goods or services;

* * *

4. Application for Permits.

a. Filing Written Application.

(1) Special Event Permit.

Any person seeking the issuance of a permit shall apply for a permit by filing a written application for permit on a form and within such time as shall be prescribed by the General Superintendent. Applications involving any of the following activities shall be filed with the Region Manager for the region in which the special event is to take place, or his/her designee:

(a) an event involving more than fifty individuals;

* * *

(g) creation or emission of any Amplified Sound,

except from a radio, recorder or other device possessed and used by an individual for his/her own enjoyment and operated in such a manner so is not to interfere with the use and enjoyment by another person . . .

b. Application Fee.

For any activity described in this chapter, Section C.4.a, no application for permit shall be considered unless the applicant shall have paid at the time for filing an application for permit the required application fee in an amount in accordance with the schedule of fees set by the General Superintendent and approved by the Board.

c. Indemnification and Reimbursement Agreement.

No application for permit shall be granted unless the applicant shall have executed an agreement with the park District, on a form to be prescribed by the General Superintendent, in which the applicant shall promise and covenant to bear all costs of policing, cleaning up and restoring the park upon conclusion of the event or activity; to reimburse the Park district for any such costs incurred by the Park District; and to indemnify the Park District and hold the Park District harmless from any liability to any person resulting from any damage or injury occurring in connection with the permitted event proximately caused by the action of the permittee, the sponsoring organization, its officers, Employees or agents or any person under their control insofar as permitted by law.

d. Security Deposit.

For any activity described in this chapter, Section

C.4.a(1), C.4.(a)(2) or Section C.4.(a)(4), no application for permit shall be granted unless the applicant has paid, within the time prescribed by the General Superintendent, the security deposit in an amount in accordance with the schedule of these set by the General Superintendent and approved by the Board. The amount of the security deposit set in the schedule of fees shall be equal to the estimated cost of policing, cleaning up, and restoring the Park upon the conclusion of the use or activity. The security deposit shall be deposited by the Park District into an escrow account. Promptly after the conclusion of a permit activity, the Park District shall inspect the premises and equipment used by the permittee.

(1) If it is determined that there has been no damage to Park District Property or equipment beyond reasonable wear and tear, the security deposit shall be refunded in full within thirty (30) days of the conclusion of the permitted event.

(2) If it is determined by such inspection, that the permitted event proximately caused damage to Park District property in excess of normal wear and tear and which requires repairs in excess of routine maintenance or determined that fines should be assessed against the permittee pursuant to this chapter, Section C.7., below, the Park District shall retain the security deposit or any portion, thereof, necessary to pay for the cost repair or any fines assessed against the permittee. The General Superintendent or his/her designee shall given written notice of the assessment of damages or fine and retention of the security deposit to the permittee by personal delivery or by deposit in the United States mail, with proper postage prepaid to

the name and address set forth in the application for permit. An assessment of damages or fine may be appealed as
provided in this chapter, Section C.6., below.

e. Fees for Use of Park Facilities.

No application for permit shall be granted unless the same shall be accompanied by a user fee as provided in the uniform schedule of fees set by the General Superintendent and approved by the Board. No application for permit shall be granted unless all required fees are paid as specified in paragraph 5(b), below.

f. Insurance.

Applicant shall procure and maintain at all times during its use of Park District property, insurance in such amounts and with such coverages as shall reasonably be required by the Park District and shall name Park District as an additional insured thereunder. The amounts and type of insurance required shall be determined by the Division of Risk Management, based upon the nature of the activity and the risk involved. The Division of Risk Management shall prepare a uniform schedule of insurance guidelines for particular types of activities. Applicant shall provide Park District with a certificate from an insurer evidencing such coverage prior to applicant's use of Park District property, and within the time prescribed by the General Superintendent. The certificate shall also provide that the insurer shall give the Park District reasonable advance notice of insurer's intent to cancel the insurance coverage provided.

g. Permits Not Transferable.

No permit or preliminarily approved permit application may be transferred.

5. Processing of Application for Permits.

* * *

e. Contents of Notice; Grounds for Denial.

Notice of denial of an application for permit shall clearly set forth the grounds upon which the permit was denied and, where feasible, shall contain a proposal by the Park District for measures by which the applicant may cure any defects in the application for permit or otherwise procure a permit. Where an application for permit has been denied because a fully executed prior application for the same time and place has been received, and a permit has been or will be granted to the prior applicant authorizing uses or activities which do not reasonably permit multiple occupancy of the particular area, the Park District shall propose an alternative place, if available, for the same time, or an alternative time, if available, for the same place.

To the extent permitted by law, the Park District may deny an application for permit if the applicant or the person on whose behalf the application for permit was made has on prior occasions made material misrepresentations regarding the nature or scope of an event or activity previously permitted or has violated the terms of prior permits issued to or on behalf of the applicant. The Park District may also deny an application

for permit on any of the following grounds:

(1) the application for permit, including any required attachments and submissions, is not fully completed and executed;

(2) the applicant has not tendered the required application fee with the application or has not tendered the required user fee, indemnification agreement, insurance certificate, or security deposit within the times prescribed by the General Superintendent;

(3) the application for permit contains a material falsehood or misrepresentation;

(4) the applicant is legally incompetent to contract or to sue and be sued;

(5) the applicant or the person on whose behalf the application for permit was made has on prior occasions damaged Park District property and has not paid in full for such damage, or has other outstanding and unpaid debts to the Park District;

(6) a fully executed prior application for permit for the same time and place has been received, and a permit has been or will be granted to a prior applicant authorizing uses or activities which do not reasonably permit multiple occupancy of the particular park or part thereof;

(7) the use or activity intended by the applicant would conflict with previously planned programs organized and conducted by the Park District and

previously scheduled for the same time and place;

(8) the proposed use or activity is prohibited by or inconsistent with the classifications and uses of the park or part thereof designated pursuant to this chapter, Section C.1., above;

(9) the use or activity intended by the applicant would present an unreasonable danger to the health or safety of the applicant, or other users of the park, of Park District Employees or of the public;

(10) the applicant has not complied or cannot comply with applicable licensure requirements, ordinances or regulations of the Park District concerning the sale or offering for sale of any goods or services;

(11) the use or activity intended by the applicant is prohibited by law, by this Code and ordinances of the Park District, or by the regulations of the General Superintendent.

(12) the applicant has not secured the requisite insurance; or

(13) the applicant or the person on whose behalf the application for permit was made has on prior occasions made material misrepresentations regarding the nature or scope of an event or activity previously permitted or has violated the terms of prior permits issued to the applicant.

f. Amendment or Revision of Applications.

Any amendment or revision of an application or permit

shall for purposes of determining the priority of the application for permit, relate back to the original filing thereof; but the time in which the Park District shall grant or deny the application for permit and serve notice of such granting or denial shall be computed from the date of the amendment or revision.

6. Procedures for Review: Waiver

a. Review by General Superintendent.

(1) Any applicant who is denied a permit or a permittee who is assessed damages or a fine pursuant to this ordinance may, within seven days of the service of notice of such determination, file a written appeal from such determination with the General Superintendent;

(2) The General Superintendent shall have seven days from the date on which the appeal was received in which to serve upon the applicant a notice that he/she has affirmed, modified or reversed the denial or fine;

(3) Such notice shall be deemed served upon the applicant or permittee when it is personally delivered or when it is sent by United States mail, with proper postage prepaid, to the name and address set forth on the application for permit;

(4) If such notice is not served upon the applicant or permittee within seven (7) days of the date upon which the appeal was filed, then the denial shall be

deemed reversed.

b. Form of Appeals.

Any appeals filed pursuant to this ordinance shall state succinctly the grounds upon which it is asserted that the denial should be modified or reversed and shall be accompanied by copies of the application for permit, the written notice of the determination of the supervisor and/or the General Superintendent, and any other papers material to the determination.

c. Waiver of Requirements.

Any requirements for use fees, deposits, proof of insurance or premium for insurance may be waived by the General Superintendent upon the recommendation of the General Counsel, if the activity is protected by the First Amendment of the United States Constitution and the condition would be so financially burdensome that it would preclude the applicant from using Park District property for the proposed activity. Fees for equipment and services may not be waived pursuant to this subsection. Application for a waiver shall be made on a form prescribed by the General Superintendent

Fines.

The violation by a permittee of the terms of his/her a permit or the laws and regulations of the Park District shall subject the permittee to a civil fine of up to $500. Each day that a violation continues shall be deemed a separate violation. Such fines may be assessed against any security deposit held by the Park District on behalf of the

permittee, pursuant to this chapter, Section C.4.d., above, or may be assessed a fine for monies in excess of any security deposit held by the Park District. Any assessment of fines in excess of any security deposit shall be subject to the appeal provisions of this chapter, Section C.6., above. The Region Manager or his/her designee shall give the permittee prompt written notice of any fines to be assessed in excess of the security deposit. Such notice shall be served on the permittee by personal delivery, or by deposit in the United States mail, with proper postage prepaid to the name and address set forth on the application for permit

Severability.

If any provision of this ordinance or the application thereof to any person or circumstance be held invalid, the remainder of this ordinance and the application of such provision to other persons or circumstances shall not be affected thereby. The Park District reserves the power to amend or repeal this ordinance at any time; and all rights, privileges and immunities conferred by this chapter or by acts done pursuant hereto shall exist subject to such power.